

1 Brian E. Pastuszenski (*pro hac vice*)
bpastuszenski@goodwinprocter.com
2 Inez Friedman-Boyce (*pro hac vice*)
ifriedmanboyce@goodwinprocter.com
3 Brian C. Devine (SBN 222240)
bdevine@goodwinprocter.com
4 **GOODWIN PROCTER LLP**
5 Exchange Place
6 Boston, MA 02109-2802
Tel.: 617-570-1000
Fax: 617-570-1231

7 Lloyd Winawer (SBN 157823)
lwinawer@goodwinprocter.com
8 **GOODWIN PROCTER LLP**
9 601 South Figueroa Street, 41st Floor
Los Angeles, California 90017
Tel.: 213-426-2500
10 Fax: 213-623-1673

11 *Attorneys for Defendants*
12 Countrywide Financial Corporation,
13 Countrywide Home Loans, Inc., CWALT,
14 Inc., CWMBS, Inc., CWABS, Inc., CWHEQ,
 Inc., Countrywide Capital Markets,
 Countrywide Securities Corporation, and N.
 Joshua Adler

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

In re COUNTRYWIDE FINANCIAL
CORP. MORTGAGE-BACKED
SECURITIES LITIGATION

Case No. 11-ML-02265-MRP (MANx)

**CONSOLIDATED
MEMORANDUM OF POINTS &
AUTHORITIES IN SUPPORT OF
THE COUNTRYWIDE
DEFENDANTS' MOTIONS TO
DISMISS**

Date/Time: February 13, 2012
11:00 a.m.

Date/Time: February 14, 2012
1:00 p.m.

Courtroom: 12

Judge: Hon. Mariana R. Pfaelzer

25 PUTNAM BANK, Individually and
26 on Behalf of All Others Similarly
-7 Situated.

Plaintiff.

Case No. 11-CV-04698-MRP (MANx)

1 v.
2 COUNTRYWIDE FINANCIAL
3 CORPORATION, *et al.*,
4 Defendants.

5 BANKERS INSURANCE
6 COMPANY, *et al.*,
7 Plaintiffs,

8 v.
9 COUNTRYWIDE FINANCIAL
10 CORPORATION, *et al.*,
11 Defendants.

12 STERLING FEDERAL BANK,
13 F.S.B.,

14 Plaintiff,
15 v.

16 COUNTRYWIDE FINANCIAL
17 CORPORATION, *et al.*,
18 Defendants.

19 WESTERN AND SOUTHERN LIFE
20 INSURANCE COMPANY, *et al.*,

21 Plaintiffs,
22 v.

23 COUNTRYWIDE FINANCIAL
24 CORPORATION, *et al.*,
25 Defendants.

26 AMERICAN FIDELITY
27 ASSURANCE COMPANY
28 Plaintiff,
v.

COUNTRYWIDE FINANCIAL
CORPORATION, *et al.*,

Case No. 11-CV-07152-MRP (MANx)

Case No. 11-CV-07163-MRP (MANx)

Case No. 11-CV-07166-MRP (MANx)

Case No. 11-CV-07167-MRP (MANx)

Defendants.

SEALINK FUNDING LIMITED.

Plaintiff,

V.

COUNTRYWIDE FINANCIAL CORPORATION, et al.,

Defendants.

Case No. 11-CV-08896-MRP (MANx)

NATIONAL INTEGRITY LIFE INSURANCE COMPANY,

Plaintiff,

Case No. 11-CV-09889-MRP (MANx)

V.

COUNTRYWIDE FINANCIAL CORPORATION, et al.,

Defendants.

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8	Restatement (Second) Conflict of Laws § 148(1)	54
9	Restatement (Second) Conflict of Laws § 148(2)	54
10	Restatement (Second) Conflict of Laws § 148(2)(a).....	56
11	Restatement (Second) Conflict of Laws § 148(2)(c).....	55, 65
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13	Restatement (Second) Conflict of Laws § 148 cmt. f	54, 57
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PRELIMINARY STATEMENT

Virtually all of the primary-liability claims alleged in the seven actions addressed in this motion—Putnam Bank, American Fidelity Assurance Co., Western & Southern Life Ins. Co., National Integrity Life Ins. Co., Bankers Ins. Co., Sterling Federal Bank, and Sealink Funding Ltd.—are time-barred under the applicable statutes of limitations and repose and therefore must be dismissed with prejudice.¹

Each of these cases makes fundamentally the same factual allegations – i.e., that Countrywide abandoned its underwriting guidelines and made loans without regard to borrower ability to pay, that appraisals were manipulated resulting in inflated loan to value ratios (“LTV”), and that owner occupancy data disclosed in MBS prospectus supplements was materially false. This Court already has held identical claims to be time-barred in four other cases included in the Countrywide MBS MDL.² Because the seven actions addressed in this motion are indistinguishable from—and were filed later than—the cases previously dismissed by the Court as untimely, these cases too are untimely and should be dismissed.

16 In addition to being time-barred, the *Sealink* case should be dismissed for the
17 separate and independent reason that the plaintiff lacks standing, and the *National*
18 *Integrity* case similarly should be dismissed because of the flagrant forum shopping
19 reflected in National Integrity’s decision to drop out of the *Western & Southern* case
20 and re-file an identical complaint in the Southern District of New York. More

¹ In this memorandum these cases will be referred to as follows: *Putnam Bank* ("Putnam"), *American Fidelity Assurance Co.* ("AFAC"), *Western & Southern Life Ins. Co.* ("Western & Southern" or "W&S"), *National Integrity Life Ins. Co.* ("National Integrity" or "NI"), *Bankers Ins. Co.* ("Bankers"), *Sterling Federal Bank* ("Sterling"), and *Sealink Funding Ltd.* ("Sealink").

² See *Maine State Ret. Sys. v. Countrywide Fin. Corp.*, 722 F. Supp. 2d 1157 (C.D. Cal. 2010) (“*Maine State I*”); *Maine State Ret. Sys. v. Countrywide Fin. Corp.*, 2011 WL 4389689 (C.D. Cal. May 5, 2011) (“*Maine State II*”); *Stichting Pensioenfonds ABP v. Countrywide Fin. Corp.*, 2011 WL 3558173 (C.D. Cal. Aug. 9, 2011) (“*Stichting*”); *Allstate Ins. Co. v. Countrywide Fin. Corp.*, 2011 WL 5067128 (C.D. Cal. Oct. 21, 2011); *United Fin. Casualty Co. v. Countrywide Fin. Corp.*, No. 11-CV-04766-MRP (MANx), slip op. (C.D. Cal. Nov. 16, 2011) (“*Progressive*”) (RJN Ex. 104).

1 specifically:

2 **1933 Act Claims.** Four of the seven actions at issue (*Putnam, AFAC, Western*
3 & *Southern*, and *National Integrity*) assert claims under the Securities Act of 1933
4 (“1933 Act”). As this Court has held, however, a reasonable investor in
5 Countrywide MBS either discovered or should have discovered the facts underlying
6 its claims by no later than “late 2007 or early 2008.” *Stichting*, 2011 WL 3558173,
7 at *8, 11. Here, all MBS purchased by Plaintiffs in these four actions were offered
8 and sold more than three years before their respective complaints were filed. As
9 such, both the 1933 Act’s one-year statute of limitations and three-year statute of
10 repose have expired. Plaintiffs argue that the limitations and repose periods were
11 tolled by the filing of the *Luther* class action in California state court, pursuant to
12 *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974). As this Court has held,
13 however, *American Pipe* tolling is inapplicable as to any MBS tranches for which
14 the *Luther* named plaintiffs lacked standing. Here, because virtually none of the
15 MBS certificates that Plaintiffs purchased also had been purchased by the *Luther*
16 named plaintiffs, tolling does not apply and Plaintiffs’ 1933 Act claims as to those
17 certificates are time-barred.

18 **1934 Act Claims.** The same four actions (*Putnam, AFAC, Western &*
19 *Southern*, and *National Integrity*) also assert claims under the Securities Exchange
20 Act of 1934 (“1934 Act”). In *Stichting, Allstate*, and *Progressive*, the Court held
21 that the 1934 Act’s two-year statute of limitations barred identical claims because a
22 reasonable investor in Countrywide MBS should have discovered facts sufficient to
23 state such claims—including facts related to scienter—more than two years before
24 those actions were filed. Here, all four actions asserting 1934 Act claims were filed
25 between January 27, 2011 and November 9, 2011—*i.e., after* the fraud claims in
26 *Allstate* had been filed and more than two years *after* the 1934 Act’s statute of
27 limitations had expired. In addition, for many of the MBS purchased by Plaintiffs,
28 the alleged misrepresentations in the offering documents were made more than five

1 years before the relevant complaint was filed. As a result, the 1934 Act's five-year
2 repose period also had expired as to those MBS. All 1934 Act claims are thus time-
3 barred and must be dismissed.

4 ***State “Blue Sky” Claims.*** Three actions (*Putnam, Western & Southern, and*
5 *National Integrity*) assert claims under state law “Blue Sky” statutes—more
6 specifically, the Connecticut Uniform Securities Act and the Ohio Securities Act.
7 Each of those statutes contains a two-year limitations period and a five-year repose
8 period. Each of these cases was filed in 2011, more than two years after this Court
9 has held a reasonable investor in Countrywide MBS would have discovered the
10 factual basis of their claims in late 2007 or early 2008. In addition, because many of
11 the alleged misrepresentations and sales occurred more than five years before the
12 complaint was filed, many of these state Blue Sky law claims are time-barred under
13 the five-year repose period as well.

14 ***Common Law Fraud, Negligent Misrepresentation.*** Six of the actions
15 (*AFAC, Western & Southern, National Integrity, Bankers, Sterling, and Sealink*)
16 assert common law fraud and negligent misrepresentation claims. Because all six
17 actions were filed in other districts and transferred to this Court under 28 U.S.C. §
18 1407, this Court must apply the choice-of-law rules of the various transferor courts
19 to determine which limitations and repose periods apply in each case. As a general
20 matter,³ Plaintiffs’ claims would be time-barred in the transferor courts to the extent
21 they are untimely under either (1) the limitations periods of the forum state where
22 the action was filed (*i.e.*, Oklahoma, Ohio, New York, Florida, Illinois) or (2) the
23 limitations periods of the jurisdiction where the claim accrued, as defined by the
24 applicable borrowing statute (*i.e.*, California for *AFAC, Western & Southern,*
25 *Bankers, and Sterling*; Ohio for *National Integrity*; and Germany for *Sealink*). Here,
26 the choice of law rules applicable in each case require application of either two- or

27
28

³ The specific choice of law rules governing each individual action are set forth in
Sections II-VIII, *infra*.

1 three-year limitations periods for all common law primary-liability claims. Because
2 a reasonable investor in Countrywide MBS should have discovered the same alleged
3 misstatements asserted in these six present actions by “late 2007 or early 2008,”
4 *Stichting*, 2011 WL 3558173, at *8, 11, more than three years before any of these
5 six actions was filed, all of Plaintiffs’ common law primary-liability claims are
6 time-barred under the applicable two- and three-year statutes of limitations.
7 Moreover, as to *Sterling*, this Court in *Allstate* dismissed substantially identical
8 fraud and negligent misrepresentation claims under the Illinois statute of repose as
9 to MBS purchased more than five years before the complaint had been filed. *See*
10 *Allstate*, 2011 WL 5067128, at *13. All but one of the MBS at issue in the later-
11 filed *Sterling* case were purchased more than five years before suit, and all claims
12 based on those MBS are likewise barred by the same repose period.

13 Moreover, the same reasons that require application of German limitations
14 periods in *Sealink* require dismissal of that case for lack of standing. The plaintiff in
15 *Sealink* is a special purpose investment vehicle (“SPV”) that was formed by a
16 German entity known as Sachsen LB. Plaintiff has incurred no losses (and will
17 incur no losses) as to the MBS over which it has sued because a group of German
18 banks have agreed to make it whole (should any losses occur) pursuant to the banks’
19 financing arrangements with Saschen. Absent any such injury, the plaintiff in
20 *Sealink* lacks standing under Article III of the U.S. Constitution. *Friends of the*
21 *Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000).

22 Likewise, the same reasons that require application of Ohio’s borrowing
23 statute and make National Integrity’s claims untimely also require dismissal of the
24 *National Integrity* case on grounds of judicial estoppel and flagrant forum shopping.
25 National Integrity dropped out of the *Western & Southern* case and filed a new case
26 in November 2011 in the Southern District of New York, in an obvious attempt to
27 trigger the application of New York’s longer statute of limitations for fraud claims.
28 But National Integrity is a resident of Ohio for purposes of New York’s borrowing

1 statute, consistent with the representations it previously made to the Southern
2 District of Ohio about where the investment decision was made to purchase the
3 MBS at issue here and the concession in its new complaint that its senior
4 management is in Ohio. Further, by filing a separate action in New York, National
5 Integrity has created tremendous judicial inefficiency, asking two courts and
6 potentially two juries to address precisely the same claims against identical
7 defendants involving precisely the same conduct relating to the same tranches of the
8 same MBS offering that were purchased on precisely the same days by the same or
9 affiliated portfolio managers. Such forum shopping should be disregarded and not
10 rewarded, and its complaint dismissed.

11 For all of these reasons, *Putnam, AFAC, Western & Southern, National*
12 *Integrity, Bankers, Sterling, and Sealink* all should be dismissed with prejudice.

13 **FACTUAL BACKGROUND**

14 The plaintiffs in the seven cases addressed in this consolidated motion to
15 dismiss are all large, sophisticated institutional investors, including federally
16 chartered savings banks, insurance companies, and investment advisors and/or
17 managers.⁴ The earliest of these seven complaints was filed on January 27, 2011,
18 and the latest was filed on November 9, 2011.⁵ Like each of the other actions
19 previously filed in or transferred to this Court as part of the *Countrywide MBS MDL*,
20

21 ⁴ Putnam is a federally chartered stock savings bank. *Putnam* Compl. ¶ 15. AFAC
22 is an insurance company. AFAC First Amended Compl. (“FAC”) ¶ 7. The Western
23 & Southern Plaintiffs are four mutual insurance companies and one registered
24 investment advisor. *W&S* Amended Complaint (“AC”) ¶¶ 2, 19. National Integrity
25 is an insurance company that primarily sells annuities. *NI* Compl. ¶ 15. The
Bankers plaintiffs are insurance companies. *Bankers* Compl. ¶ 18-21. Sterling is a
federally chartered savings bank. *Sterling* Compl. ¶ 19. Sealink is a SPV
established to “receive, hold and manage RMBS purchased by certain [other] special
purpose vehicles.” *Sealink* Compl. ¶ 12. Collectively, the plaintiffs in all actions
are referred to herein as “Plaintiffs.”

26 ⁵ *Putnam* was filed on January 27, 2011; *Sterling* was filed on March 23, 2011;
27 AFAC was filed on April 1, 2011, and the First Amended Complaint was filed on
June 7, 2011; *Western & Southern* was filed on April 27, 2011, and an amended
complaint was filed on November 8, 2011; *Bankers* was filed on July 22, 2011;
28 *Sealink* was filed on September 29, 2011; and *NI* was filed on November 9, 2011.

1 the complaints in these seven cases are all based on common factual allegations—
2 allegations that are also substantially similar (if not identical) to the allegations in
3 the *Stichting* and *Allstate* complaints previously dismissed in whole or in large part
4 by this Court. Detailed charts comparing the key factual allegations in *Stichting*,
5 *Allstate*, and each of the seven complaints at issue in this motion are attached hereto
6 as Appendix (“App.”) 1-7.

7 Just as in *Stichting* and *Allstate*, the core allegation of the seven complaints at
8 issue is that the shelf registration statements and prospectus supplements issued in
9 connection with the MBS that Plaintiffs purchased (collectively, the “Offering
10 Documents”) failed to disclose that Countrywide allegedly “systematically
11 disregard[ed] the mortgage loan underwriting guidelines that [were] stated in the
12 Certificates’ Offering Documents.” *Putnam* Compl. ¶ 5; *Stichting*, 2011 WL
13 3558173, at *9 (“the gravamen of Plaintiff’s claim is that Countrywide wholly
14 abandoned its underwriting standards”).⁶ As in both *Stichting* and *Allstate*,
15 Plaintiffs here all allege that Countrywide abandoned its underwriting guidelines
16 when it (1) “adopted a ‘matching’ strategy [whereby it] would [provide] any
17 mortgage product feature offered by a competitor”; (2) “set up a system whereby
18 any loan [c]ould be approved by way of underwriting ‘exceptions’”; and (3)
19 “coached borrowers on how to apply for loan products that required little or no
20 income or asset verification.” *Putnam* Compl. ¶¶ 6-7.⁷ Plaintiffs also allege that

21 ⁶ *Accord Bankers* Compl. ¶ 55 (Countrywide “systematically disregard[ed] its stated
22 underwriting standards”); *Sterling* Compl. ¶ 52 (same); *AFAC FAC* ¶ 2
23 (Countrywide “systematically ignore[d] the underwriting standards it touted”);
24 *Western & Southern AC* ¶¶ 65, 84 (Countrywide “disregard[ed] [] its own
25 underwriting guidelines in favor of blindly approving nearly any kind of loan” and
“systematically abusing the ‘exceptions’ process in order to further circumvent its
purported underwriting standards”); *NI* Compl. ¶¶ 65, 84 (same); *Sealink* Compl.
¶ 82 (“Countrywide ‘developed a systematic pattern and practice of abandoning its
own guidelines for loan origination and underwriting’”).

26 ⁷ *Accord AFAC FAC* ¶¶ 2-3 (same); *Western & Southern AC* ¶ 85-86 (same); *NI*
27 Compl. ¶¶ 85-86 (same); *Bankers* Compl. ¶¶ 42, 75, 107 (Countrywide (i)
“implemented a program which allowed loan officers to ‘match’ the most aggressive
product or policy of any loan origination competitor;” (ii) “created and approved
28 riskier loan products not only by implementing looser stated underwriting
guidelines, but also by applying numerous exceptions to its already weakened

1 “Countrywide used affiliated rather than independent appraisers, and . . . pressur[ed]
2 appraisers to inflate their appraisal” and allegedly cherry-picked loans for
3 securitization by “keeping higher-quality loans for its own portfolio,” overstated the
4 percentage of full-documentation loans in the Offering Documents, “facilitated the
5 widespread falsification” of borrower information, and provided “incomplete and
6 error-ridden loan data” to credit rating agencies. *Putnam* Compl. ¶¶ 70-71, 76, 79,
7 82.⁸

8 All of this was done, according to Plaintiffs, to allow Countrywide to “capture
9 market share and quick profits” as it “experienced exponential growth in its
10 subprime mortgage loan origination business.” *Putnam* Compl. ¶¶ 5, 50.⁹

11 standards;” and (iii) “coached [loan] applicants on the level of employment income
12 needed to qualify for a mortgage loan”); *Sterling* Compl. ¶¶ 39, 72, 104
13 (Countrywide (i) “implemented a program which allowed loan officers to ‘match’
14 the most aggressive product or policy of any loan origination competitor;” (ii)
15 “appl[ied] numerous exceptions to its already weakened [underwriting] standards;”
16 and (iii) “coached [loan] applicants on the level of employment income needed to
17 qualify for a mortgage loan”); *Sealink* Compl. ¶ 64 (“Countrywide . . . allowed
18 pervasive exceptions to its stated underwriting standards in the absence of
19 compensating factors”).

20 ⁸ *Accord Bankers* Compl. ¶¶ 129, 158, 167, 218 (Countrywide allegedly “did not
21 consistently evaluate the borrowers’ ability to repay the loans,” “engaged in
22 widespread appraisal-related misconduct by inflating the value of properties in order
23 to support the loans that it wished to make,” “knowingly select[ed] risky loans for
24 the Certificates while ‘cherry picking’ the best loans for [its] own portfolio,” and
25 “provided false information about the mortgage loans underlying the Certificates to
26 the credit rating agencies”); *Sterling* Compl. ¶¶ 126, 156, 165, 216 (same); *Western*
27 & *Southern* AC ¶¶ 89, 244, 258 (Countrywide allegedly “regularly pressured
28 appraisers to value mortgaged properties at pre-determined, inflated and false
values,” had a “practice of ‘cherry picking’ toxic loans for inclusion in
securitizations;” and “essentially pre-determined the ratings by ‘feeding garbage’
into the ratings system”); *NI* Compl. ¶¶ 89, 244, 258 (same); *AFAC* FAC ¶¶ 81, 84,
185 (Countrywide allegedly “used affiliated rather than independent appraisers, and
. . . pressur[ed] appraisers to inflate their appraisals;” “cherry-pick[ed] the higher-
quality loans” for itself; and “essentially pre-determined the ratings” by providing
false “garbage” data to the ratings agencies); *Sealink* Compl. ¶ 100 (“[t]he credit
ratings of the RMBS were further compromised by misinformation provided by
Defendants regarding the abandonment of the originators’ underwriting standards,
rampant use of aggressive exceptions, Defendants’ knowledge or reckless disregard
of pervasive fraud in the stated income loan programs, and the inflated appraisals
assigned to the underlying collateral . . . ”).

29 ⁹ *Accord AFAC* FAC ¶¶ 2, 52 (Countrywide “singularly focused on increasing its
market share” as it “greatly increased production of subprime loans”); *Western* &
30 *Southern* AC ¶¶ 63, 65 (alleged misconduct intended to allow Countrywide to
“increase its market share” as part of “its quest for larger and larger loan volume”);

1 According to Plaintiffs, these practices were not disclosed by Countrywide in the
2 Offering Documents, and thus Plaintiffs allege that they purchased MBS that “were
3 in fact far riskier than Countrywide had described them to be” and have “incurred
4 substantial losses in market value and lost principal and interest payments.” *Putnam*
5 Compl. ¶¶ 57, 99-101.¹⁰ Thus, Plaintiffs’ alleged injury in each of these actions is
6 the same injury alleged by the plaintiff in *Stichting*: “[t]he injury that Plaintiff
7 alleges is that it purchased riskier-than-advertised RMBS because of Countrywide’s
8 misrepresentations.” 2011 WL 3558173, at *7.

9 The Plaintiffs’ various MBS purchases and claims are asserted in the
10 respective complaints as follows:

11 *Putnam*: Putnam allegedly purchased eight MBS, issued in eight separate
12 offerings by Countrywide, between February 6, 2006 and October 10, 2007.
13 *Putnam* Compl. ¶ 15. The details of Putnam’s purchases, including the offerings
14 and tranches purchased, purchase dates, and dates for the relevant Offering
15 Documents are summarized in App. 8. The Complaint, filed on January 27, 2011,
16 asserts violations of Sections 10(b) and 20(a) of the Securities Exchange Act of
17 1934 (the “1934 Act”) (Counts I and II), Sections 11, 12(a)(2), and 15 of the
18 Securities Act of 1933 (the “1933 Act”) (Counts III-V), and Section 36b-4 of the
19 Connecticut Uniform Securities Act (Count VI).

20

21 *NI* Compl. ¶¶ 63, 65 (same); *Bankers* Compl. ¶ 55 (alleged goal was to increase
22 market share by “originat[ing] an unprecedented number of loans for
23 securitization”); *Sterling* Compl. ¶ 52 (same); *Sealink* Compl. ¶¶ 1, 5 (“Countrywide
was driven to purchase and securitize defective loans . . . for a sole purpose: to
securitize as many mortgage loans as possible into RMBS and generate profits for
the Countrywide Defendants”).

24 ¹⁰ *Accord AFAC FAC* ¶¶ 256-57 (same); *Western & Southern AC* ¶¶ 286, 288 (MBS
25 “were far riskier than [Countrywide] described” and Plaintiffs have “seen substantial
losses in the market value of [the] Certificates”); *NI* Compl. ¶¶ 286, 288 (same);
26 *Bankers* Compl. ¶¶ 158, 183-84 (MBS “were far riskier . . . than they were
represented to be by the Countrywide Defendants” and Plaintiffs have suffered
losses “because the mortgage loans underlying the Certificates experienced defaults
and delinquencies,” which have “significantly devalued [Plaintiffs’] investment and
foreclosed the full payment of [principal] and interest”); *Sterling* Compl. ¶¶ 156,
27 181-84 (same); *Sealink* Compl. ¶¶ 8, 52, 58, 101, 114 (same).

1 **AFAC**: AFAC allegedly purchased nine MBS, issued in nine separate
2 offerings by Countrywide, between August 4, 2005 and May 1, 2008. AFAC FAC
3 ¶ 32. The details of these purchases, including the offerings and tranches purchased,
4 purchase dates, and dates for the relevant Offering Documents are summarized in
5 App. 9. The First Amended Complaint, filed on June 7, 2011, asserts violations of
6 Sections 10(b) and 20(a) of the 1934 Act (Counts I and II), common law fraud
7 (Count III), aiding and abetting common law fraud (Count IV), common law
8 negligent misrepresentation (Count V), and Sections 11, 12(a)(2), and 15 of the
9 1933 Act (Counts VI-VIII).

10 **Western & Southern**: The Western & Southern plaintiffs allegedly
11 purchased 36 MBS, issued in 32 separate offerings by Countrywide, between June
12 21, 2005 and March 25, 2008, in both initial offerings and in the after-market. W&S
13 AC ¶ 75, Ex. A. The details of these purchases, including the offerings and tranches
14 purchased, purchase dates, and dates for the relevant Offering Documents are
15 summarized in App. 10. The Amended Complaint, filed on November 8, 2011,
16 asserts violations of the Ohio Securities Act (Counts I-V), the Ohio Corrupt
17 Activities Act (Count VI), common law negligent misrepresentation (Count VII),
18 Sections 10(b) and 20(a) of the 1934 Act (Counts VIII and IX), Sections 11,
19 12(a)(2), and 15 of the 1933 Act (Counts X-XII), common law fraud (Count XIV),
20 and civil conspiracy (Count XV).

21 **National Integrity**: National Integrity was originally a plaintiff in the
22 *Western & Southern* action, but dropped out of that action when the Western &
23 Southern plaintiffs filed their Amended Complaint. National Integrity then filed a
24 separate—but substantively identical—action in the Southern District of New York
25 on November 9, 2011. National Integrity allegedly purchased 26 MBS, issued in 24
26 separate offerings by Countrywide, between September 30, 2005 and March 25,
27 2008, in both initial offerings and in the after-market. NI Compl. Ex. A. The details
28 of these purchases, including the offerings and tranches purchased, purchase dates,

1 and dates for the relevant Offering Documents are summarized in App. 11. The *NI*
2 Complaint, filed on November 9, 2011, asserts exactly the same primary-liability
3 claims asserted in *Western & Southern*: violations of the Ohio Securities Act
4 (Counts I-V), the Ohio Corrupt Activities Act (Count VI), common law negligent
5 misrepresentation (Count VII), Sections 10(b) and 20(a) of the 1934 Act (Counts
6 VIII and IX), Sections 11, 12(a)(2), and 15 of the 1933 Act (Counts X-XII),
7 common law fraud (Count XIV), and civil conspiracy (Count XV).

8 **Bankers**: The *Bankers* plaintiffs allegedly purchased 16 MBS, issued in 15
9 separate offerings by Countrywide, between November 22, 2005 and July 16, 2008.
10 *Bankers* Compl. ¶ 6. The details of these purchases, including the offerings and
11 tranches purchased, purchase dates, and dates for the relevant Offering Documents
12 are summarized in App. 12. The Complaint, filed on July 22, 2011, asserts primary-
13 liability claims for common law fraud (Count I), fraudulent inducement (Count II),
14 aiding and abetting fraud (Count III), and negligent misrepresentation (Count V).

15 **Sterling**: Sterling allegedly purchased four Countrywide-issued MBS
16 between September 30, 2004 and November 6, 2006. *Sterling* Compl. ¶¶ 1, 6, 25,
17 26. The details of these purchases, including the offerings and tranches purchased,
18 purchase dates, and dates for the relevant Offering Documents are summarized in
19 App. 13. The Complaint, filed on March 23, 2011, asserts primary-liability claims
20 for common law fraud (Count I), fraudulent inducement (Count II), aiding and
21 abetting fraud (Count III), and common law negligent misrepresentation (Count V).

22 **Sealink**: Sealink is suing over 31 MBS issued or underwritten in 30 separate
23 offerings by Countrywide, between 2005 and 2007. *Sealink* Compl. ¶¶ 2, 33. The
24 details of these purchases, including the offerings and tranches purchased, and dates
25 for the relevant Offering Documents are summarized in App. 14. The Complaint,
26 filed on September 29, 2011, asserts primary-liability claims for common law fraud
27 (Count I), fraudulent inducement (Count II), aiding and abetting fraud (Count III),
28 and common law negligent misrepresentation (Count IV).

ARGUMENT

I. THIS COURT HAS ALREADY DISMISSED PREVIOUSLY FILED, VIRTUALLY IDENTICAL COMPLAINTS AS TIME-BARRED.

In other cases pending in the *Countrywide MBS MDL*, this Court already has dismissed previously filed complaints as time-barred pursuant to the applicable statutes of limitations and repose. Because those complaints asserted claims and factual allegations that were virtually identical to those asserted here, this Court’s prior dismissal rulings also require the dismissal of the complaints in *Putnam, AFAC, Western & Southern, National Integrity, Bankers, Sterling, and Sealink*.

A. *Maine State I*

In *Maine State I*, the Court dismissed claims under Sections 11, 12(a)(2), and 15 of the 1933 Act asserted on behalf of a putative class of purchasers in 427 offerings of Countrywide MBS, holding that they were time-barred under the 1933 Act’s one-year statute of limitations and three-year statute of repose. More specifically, the Court concluded that plaintiffs discovered the basis of their 1933 Act claims in the 2007-08 period, and that the statute of limitations therefore expired long before plaintiffs filed their complaint in January 2010. See *Maine State I*, 722 F. Supp. 2d at 1165. In addition, the Court held that any 1933 Act claims based on MBS that were offered or sold prior to January 2007—*i.e.*, over three years before the complaint was filed—were time-barred by the statute of repose. See *id.*

The *Maine State* plaintiffs argued that their claims were tolled by the filing of the *Luther* class action,¹¹ pursuant to the class action tolling doctrine set forth in *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974).¹² The Court, however,

¹¹ As the Court is well aware, *Luther v. Countrywide Home Loans Servicing LP*, No. BC380698 (Cal. Super. Ct. Nov. 14, 2007) and *Wash. State Plumbing & Pipefitting Pension Trust v. Countrywide Fin. Corp.*, No. BC392571 (Cal. Super. Ct. June 12, 2008) (collectively, “*Luther*”), are putative state court class actions asserting 1933 Act claims on behalf of investors in 429 Countrywide MBS offerings, based on the same underlying allegations made in the seven cases at issue here.

¹² *American Pipe* and its progeny held that “[t]he filing of a class action tolls the statute of limitations ‘as to all asserted members of the class.’” *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 350 (1983).

1 held that any potential *American Pipe* tolling “applies only to securities where the
2 named plaintiffs [in the class action] had actual standing to bring the lawsuit.”
3 *Maine State I*, 722 F. Supp. 2d at 1166-67. Thus, because “a plaintiff lacks standing
4 . . . to represent the interests of investors in MBS offerings in which the plaintiffs
5 did not themselves buy,” *id.* at 1163, the Court concluded that *American Pipe* tolling
6 was inapplicable to any MBS offerings for which no *Luther* named plaintiff actually
7 purchased securities. *Id.* at 1166-67. It then dismissed the complaint in its entirety,
8 finding that “Plaintiffs have not adequately pleaded their reliance on *American Pipe*
9 tolling to preserve their claims.” *Id.* at 1162, 1167-68.

10 **B. Maine State II**

11 In *Maine State II*, the Court held that plaintiffs must establish that they have
12 “tranche-based standing” under the 1933 Act—that is, a plaintiff’s standing is
13 limited to the specific tranche it actually purchased, and does not extend to all
14 tranches in the associated offering. 2011 WL 4389689, at *2-8.¹³ Thus, because
15 any potential *American Pipe* tolling based on *Luther* is applicable “only with respect
16 to those securities as to which the named plaintiffs in *Luther* and *Washington State*
17 had standing to sue,” “[t]here can be no tolling with respect to securities [*i.e.*,
18 tranches] the *Luther* plaintiffs did not purchase.” *Id.* at *4, *6. Instead, “to the
19 extent that the *Luther* state court plaintiffs did not themselves buy particular
20 Certificates included in the [Amended Complaint], the relevant limitations periods
21 continued to run with respect to those tranches.” *Id.* at *6.

22 As a result of the Court’s rulings in *Maine State I* and *II*, the scope of the case
23 was reduced from 427 offerings to just eight individual tranches of MBS. The Court
24 also noted that its rulings would have a significant impact beyond *Maine State*, and
25 would apply to any plaintiff—like those here—that asserts tolling based on the filing
26 of *Luther*: “the Court’s decision about whether to impose a tranche standing

27

28 ¹³ The Court held that Article III of the U.S. Constitution imposes this same requirement. *See id.* at *6-8.

1 requirement affects not only the litigants in this case, but potentially any other
2 plaintiffs who seek the benefits of tolling based on *Luther*.” *Id.* at *4.

3 **C. Stichting Pensioenfonds ABP**

4 In *Stichting*, the Court dismissed substantially similar claims under the 1933
5 Act, the 1934 Act, the California Corporations Code, and for common law fraud,
6 aiding and abetting fraud, and negligent misrepresentation.

7 First, the Court concluded that the plaintiff’s 1933 Act claims were untimely
8 as to all MBS at issue because they were offered or sold more than three years
9 before the complaint was filed. As such, the 1933 Act statute of repose had expired.
10 See *Stichting*, 2011 WL 3558173, at *2. The Court then reaffirmed its tolling
11 rulings in *Maine State I* and *II*, holding that “the *Luther* complaints only toll claims
12 for certificates which the named plaintiffs in *Luther* had purchased. . . . i.e., that the
13 named plaintiff in *Luther* must have purchased the same certificate, in the same
14 tranche, to toll a claim under *American Pipe*.” *Id.* Given these rulings, the Court
15 granted the Countrywide Defendants’ motion to dismiss, because the plaintiff failed
16 to allege “the grounds for asserting that a *Luther* plaintiff also purchased the
17 security; the tranche of the security that the *Luther* plaintiff purchased; and the date
18 on which that *Luther* plaintiff joined the *Luther* case.” *Id.*¹⁴

19 Second, the Court dismissed the 1934 Act claims with prejudice, holding that
20 “a reasonable plaintiff exercising reasonable diligence . . . should have discovered
21 facts sufficient to state every element of its claim”—including scienter—“at least
22 prior to February 14, 2009 [i.e., two years before the filing of the relevant
23 complaint].” *Id.* at *11. Thus, the two-year statute of limitations had expired, and
24 plaintiff’s 1934 Act claims were time-barred. Among other things, the Court made
25 the following findings, all of which are equally applicable to the seven cases here:

26 ¹⁴ See also *id.* (“Plaintiff may not assert §§ 11 or 12(a)(2) claims for any certificate
27 which a *Luther* plaintiff did not purchase, nor for any certificate for which the three-
year statute of repose expired before the *Luther* plaintiff either acquired the security
or joined the *Luther* case.”) The Court granted the *Stichting* plaintiff leave to re-
plead its 1933 Act claims, *see id.*, but plaintiff declined to do so.

- 1 • “Other complaints and public press reports make clear that a reasonable
2 investor would have been aware of problems with underwriting at
3 Countrywide by early 2008. . . . Many of these investigations and lawsuits
4 were public and well-publicized.” *Id.* at *8 (summarizing complaints filed
5 in 2007-08 that alleged substantially similar 1934 Act claims).
- 6 • “[R]eports of problems with underwriting at Countrywide were widely
7 disseminated in the press, corroborated in government hearings and by the
8 announcement of investigations, and bolstered further when several state
9 Attorneys General filed suit. . . .” *Id.* at *8 n.9.
- 10 • “Plaintiff was clearly on notice of Countrywide’s misrepresentations
11 regarding underwriting standards by late 2007 or early 2008.” *Id.* at *8.
- 12 • The “gravamen of Plaintiff’s claim is that Countrywide wholly abandoned
13 its underwriting standards. The press and numerous widely reported
14 lawsuits had made exactly this allegation by the end of 2007.” *Id.* at *9.
- 15 • “Numerous lawsuits alleging risky loan-origination practices at
16 Countrywide have, in fact, survived motions to dismiss. . . . The Court
17 takes judicial notice of these suits as evidence that a reasonably diligent
18 investor should have been aware of facts regarding Countrywide’s risky
19 loan origination operations and the associated misrepresentations.” *Id.*
- 20 • “The shareholder, debentureholder, and derivative suits against
21 Countrywide all made the same allegation: Countrywide stock/debt
22 decreased in value when the market realized that Countrywide had been
23 misrepresenting the quality of the loans it was writing. These allegations
24 involve the same underlying conduct (abandonment of underwriting
25 standards) and the same fraudulent purpose . . . alleged here.” *Id.* at *10.
- 26 • “[P]ublic press reports and earlier-filed lawsuits placed Plaintiff on notice
27 regarding the scienter element of its claim.” *Id.* at *11.
- 28 • “All of these facts were publicly reported and appear in multiple

1 complaints filed in 2007 and 2008. . . . Other plaintiffs recognized that
2 such facts were available by 2007, and this Court subsequently held that
3 those plaintiffs had pleaded scienter adequately.” *Id.*

4 The Court also concluded that plaintiff’s 1934 Act claims as to certain MBS
5 were independently time-barred by the five-year statute of repose. *See id.* at *6.
6 Reognizing that the repose period “begins to run on the date that the plaintiff
7 purchased the securities at issue,” the Court held that “Plaintiff may not assert a §
8 10(b) claim for any certificate which it purchased prior to February 14, 2006 [i.e.,
9 five years before the relevant complaint]” and dismissed the claims as to those
10 MBS. *Id.*

11 Third, the Court dismissed plaintiff’s California Corporations Code and
12 California common law negligent misrepresentation claims for the same reasons it
13 dismissed the 1934 Act claims. *See id.* at *13. Like the 1934 Act claims, the
14 California Corporation Code and negligent misrepresentation claims were subject to
15 two-year statutes of limitations, and thus were time-barred because “a reasonable
16 plaintiff exercising reasonable diligence . . . should have discovered facts sufficient
17 to state every element of its claim at least prior to February 14, 2009.” *Id.* at *11.

18 Fourth, the Court also dismissed plaintiff’s California common law fraud and
19 aiding and abetting claims, which were subject to a three-year statute of limitations.
20 *See id.* at *12. Applying the inquiry notice standard under California law, the Court
21 held that “[t]he widespread public press coverage combined with the filing of the
22 shareholder suits in August 2007, the *Arkansas Teachers Retirement System* action
23 in November 2007, and the *New York City Employees Retirement System* action in
24 January 2008 were enough to alert a reasonable person to wrongdoing in
25 Countrywide’s loan origination business” prior to February 14, 2008 (i.e., three
26 years before the relevant complaint). *Id.*

27 **D. Allstate**

28 In *Allstate*, the Court dismissed as time-barred nearly identical claims under

1 the 1933 Act and the 1934 Act, and certain claims for common law fraud, aiding
2 and abetting fraud, and negligent misrepresentation under Illinois law.

3 For the 1933 Act claims, the Court reaffirmed its *Maine State I* and *II* and
4 *Stichting* rulings, holding that “the doctrine of *American Pipe* tolled the statute of
5 limitations [and repose] only for those Certificates that the named plaintiffs in the
6 prior putative class actions had standing to sue, *i.e.*, those tranches that the *Luther*
7 named plaintiffs had actually purchased.” 2011 WL 5067128, at *1, *10. Thus,
8 because “[n]one of the *Luther* named plaintiffs purchased any of the Certificates that
9 Allstate is now claiming losses on,” “Allstate is therefore not entitled to *American*
10 *Pipe* tolling” and “Allstate’s claims are time-barred.” *Id.* at *10.

11 For the 1934 Act claims, the Court held that Allstate reasonably should have
12 discovered facts sufficient to state its claims at least by December 27, 2008 (*i.e.*,
13 more than two years before filing its complaint on December 27, 2010). *Id.* at *11.
14 Relying on its holding in *Stichting*, the Court concluded that Allstate’s allegation of
15 systematic abandonment of underwriting standards was the same allegation that had
16 been made in the various press reports and earlier-filed lawsuits in 2007-08, “and
17 which has been repeated by every Countrywide plaintiff since.” *Id.*¹⁵ The Court
18 also noted that it denied motions to dismiss in the Countrywide shareholder class
19 action—finding, among other things, “a sufficient inference of scienter”—“several
20 weeks before the § 10(b) threshold date of December 27, 2008.” *Id.* (citing *In re*
21 *Countrywide Fin. Corp. Sec. Litig.*, 588 F. Supp. 2d 1132 (C.D. Cal. 2008) (Dec. 1,
22 2008)). Allstate argued that *Stichting* was distinguishable for several reasons, but
23 the Court concluded that “[n]one of Allstate’s arguments are persuasive.” *Id.*

24 For the state law fraud, aiding and abetting, and negligent misrepresentation
25 claims, the Court applied New York’s borrowing statute and determined that the
26 claims of certain plaintiffs (who were Illinois residents) were subject to the three-

27 ¹⁵ The 2007-08 complaints that were before the Court in *Stichting* and *Allstate* are
28 attached to the Countrywide Defendants’ Request for Judicial Notice at Exs. 71-78,
80-87, 91.

1 year statute of limitations and five-year statute of repose of the Illinois Securities
2 Law. *See id.* at *8-9. Because the five-year repose period runs “from the date of
3 sale,” the Court then held that it “therefore prohibits claims for any RMBS that the
4 Illinois Plaintiffs purchased before December 27, 2005 [i.e., five years before the
5 complaint was filed on December 27, 2010].” *Id.* at *13.¹⁶

6 **E. Progressive**

7 Finally, in *Progressive*, the Court dismissed claims under the 1934 Act, the
8 California Corporations Code, and California common law as time-barred. Because
9 *Progressive* was “indistinguishable from *Stichting*,” and was filed after *Stichting*,
10 the Court concluded that the *Progressive* complaint was untimely and dismissed it
11 with prejudice. RJN Ex. 104 at 2-3.

12 **II. ALL CLAIMS IN PUTNAM ARE TIME-BARRED.**

13 **A. Putnam’s 1933 Act Claims Are Untimely.**

14 As in *Maine State*, *Stichting*, and *Allstate*, Putnam’s 1933 Act claims are
15 time-barred by both the one-year statute of limitations and the three-year statute of
16 repose. *See* 15 U.S.C. § 77m.¹⁷ First, all eight MBS at issue were offered to the
17 public and sold to Putnam before January 27, 2008—i.e., more than three years
18 before the complaint was filed. *See Putnam Compl.* ¶ 15; App. 8 (latest shelf
19 registration statement at issue dated April 24, 2007; latest prospectus supplement at
20 issue dated September 27, 2007; latest Putnam purchase dated October 10, 2007).¹⁸

21

¹⁶ With respect to the three-year statute of limitations, however, the Court noted that
22 while “[i]t is possible, even probable, that Defendants will be able to . . . show that
23 the Illinois Plaintiffs’ claims are time-barred,” the relevant legal standard “require[d]
fact-specific inquiries that render this issue more appropriate for summary
judgment.” *Id.* at *14.

24 ¹⁷ *See id.* (1933 Act claims must be filed “within one year after the discovery of the
25 untrue statement or omission, or after such discovery should have been made by the
26 exercise of reasonable diligence,” and “[i]n no event . . . more than three years after
the security was bona fide offered to the public [for Section 11 claims], or . . . the
sale [for Section 12(a)(2) claims]”) (emphasis added).

27 ¹⁸ As this Court held in *Maine State I*, for purposes of the statute of repose
28 applicable to Section 11 claims, the relevant “offering” date to trigger the repose
period is the effective date of the shelf registration statement for shelf registrations
before December 1, 2005, and the date of the prospectus supplement for issuers and

1 In addition, as the Court held in *Maine State, Stichting*, and *Allstate*, Putnam either
2 discovered or should have discovered by the exercise of reasonable diligence the
3 allegedly untrue statements long before January 27, 2010—*i.e.*, more than one year
4 before the complaint was filed.¹⁹ Thus, Putnam’s 1933 Act claims are plainly time-
5 barred on their face.

6 Like the plaintiffs in *Maine State, Stichting*, and *Allstate*, Putnam argues that
7 its 1933 Act claims were tolled under *American Pipe* by the filing of the *Luther*
8 class action. *See Putnam Compl. ¶¶ 105-17.* That is wrong. Under this Court’s
9 rulings in *Maine State, Stichting*, and *Allstate*, the only MBS eligible for *American*
10 *Pipe* tolling are those for which “the named plaintiffs in the prior putative class
11 actions had standing to sue, *i.e.*, those tranches that the *Luther* named plaintiffs had
12 actually purchased.” *Allstate*, 2011 WL 5067128, at *1, *10; *accord Maine State II*,
13 2011 WL 4389689, at *2-8; *Stichting*, 2011 WL 3558173, at *2. Here, none of the
14 *Luther* named plaintiffs purchased in any of eight *offerings*—let alone the same
15 *tranche* within those offerings—as Putnam. *See Putnam Compl. ¶¶ 1, 15; RJD Ex.*
16 102; App. 8.²⁰ As such, Putnam is not entitled to *American Pipe* tolling, and its
17 1933 Act claims are time-barred as to all eight MBS.

18 **B. Putnam’s 1934 Act Claims Are Untimely.**

19 Putnam’s 1934 Act claims are also time-barred as to all eight MBS by the

20 underwriters for shelf registrations after December 1, 2005. *Maine State I*, 722 F.
21 Supp. 2d at 1165 n.8.

22 ¹⁹ *See Maine State I*, 722 F. Supp. 2d at 1165 (holding that plaintiffs discovered the
23 basis for their 1933 Act claims no later than 2007-08); *Stichting*, 2011 WL 3558173,
24 at *8 (“Plaintiff was clearly on notice of Countrywide’s misrepresentations
regarding underwriting standards by late 2007 or early 2008.”); *Allstate*, 2011 WL
25 5067128, at *10-11 (same). Putnam’s argument that it “had no way of knowing
26 [that] Defendants[’] representations in the Offering Documents were false” until the
SEC made certain documents public in 2009-10, *see Putnam Compl. ¶ 118*, was
flatly rejected in *Stichting*. *See* 2011 WL 3558173, at *9 (“Plaintiff is not entitled to
rely on the SEC complaint as its ‘trigger’ event with respect to Countrywide’s
alleged misrepresentations regarding its underwriting practices.”).

27 ²⁰ The Complaint alleges that the *Luther* named plaintiffs purchased in CWHL 2006-
12. *See Putnam Compl. ¶ 112.* The *Luther* named plaintiffs’ publicly-filed PSLRA
certifications, however—of which the Court may take judicial notice (RJD at 12-
28 13)—clearly shows that they did not. *See RJD Ex. 102; App. 8.*

1 applicable two-year statute of limitations. *See* 28 U.S.C. § 1658(b).²¹ In *Allstate*,
2 the Court held that a reasonable investor in Countrywide MBS, exercising
3 reasonable diligence, should have discovered facts sufficient to state every element
4 of a 1934 Act claim based on Countrywide’s alleged abandonment of underwriting
5 standards—including scienter—by no later than *December 27, 2008*. *See* 2011 WL
6 5067128, at *11-13. By definition, then, Putnam clearly should have discovered
7 such facts before *January 27, 2009*—*i.e.*, more than two years before the complaint
8 was filed.²² In short, because the 1934 Act claims in *Putnam* are effectively
9 identical to the 1934 Act claims found to be untimely in *Allstate*, *see supra* at 15-17
10 & App. 1, and *Allstate* was filed before *Putnam*, it necessarily follows that Putnam’s
11 1934 Act claims are also time-barred and must be dismissed with prejudice.²³

12 **C. Putnam’s Connecticut Uniform Securities Act Claim Is Untimely.**

13 Putnam’s claim under the Connecticut Uniform Securities Act (“CUSA”) is
14 also time-barred. For CUSA claims “arising out of intentional misrepresentation or

15
16 ²¹ *See id.* (1934 Act claims must be asserted “not later than the earlier of . . . two
17 years after the discovery of the facts constituting the violation; or . . . five years after
such violation”); *Merck & Co. v. Reynolds*, 130 S. Ct. 1784, 1798 (2010) (holding
18 that scienter is among “the facts constituting the violation” for Section 10(b) claim).

19 ²² Because *Luther* did not assert 1934 Act claims, there is no class action that could
conceivably serve as a basis for *American Pipe* tolling of Putnam’s 1934 Act claims.

20 ²³ Putnam’s 1934 Act claim as to CWALT 2005-43 is also time-barred by the five-
year statute of repose, because the relevant registration statement and prospectus
21 supplement were filed more than five years before the *Putnam* complaint was filed.
See In re Exxon Mobil Corp. Sec. Litig., 500 F.3d 189, 200 (3d Cir. 2007) (“the
22 repose period applicable to § 10(b) claims . . . begins to run on the date of the
alleged misrepresentation” because “the specific acts targeted by a § 10(b) cause of
23 action are [the] fraudulent statements themselves”); *McCann v. Hy-Vee, Inc.*, 2011
24 WL 5924414, at *6 (7th Cir. Nov. 22, 2011) (“violation” is “defined . . . as the
misrepresentation”); *In re Brocade Commc’ns Sys., Inc. Deriv. Litig.*, 615 F. Supp.
2d 1018, 1035 (N.D. Cal. 2009) (“begins to run on the date of the [allegedly] false
25 representation”); *accord Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*,
501 U.S. 350, 364 (1991) (repose period measured from date of “alleged
26 misrepresentations”). The Countrywide Defendants are aware that the Court has
held that the 1934 Act repose period begins to run on the date of purchase, *see*
27 *Stichting*, 2011 WL 3558173, at *6, but respectfully request that the Court
reconsider its ruling. As explained in *Exxon* and *McCann*, the repose period runs
from the date of the “violation” (*i.e.*, when a material false statement is made with
28 scienter), not the date of accrual of a plaintiff’s private right of action (*i.e.*, when all
required elements of the alleged claim have occurred).

1 fraud in the purchase or sale of securities,” “no person may bring an action more
2 than *two years* from the date when the misrepresentation or fraud is discovered or in
3 the exercise of reasonable care should have been discovered, except that no such
4 action may be brought more than *five years* from the date of such misrepresentation
5 or fraud.” CONN. GEN. STAT. § 36b-29(f) (emphasis added). Because the CUSA
6 limitations/repose statute is substantially similar to that governing Putnam’s 1934
7 Act claims, they should be interpreted and applied the same way.²⁴

8 Putnam’s CUSA claim is thus time-barred for the same reasons that its 1934
9 Act claims are time-barred. As the Court held in *Allstate*, Putnam should have
10 reasonably discovered “the misrepresentation or fraud” by no later than December
11 2008, if not sooner. *See* 2011 WL 5067128, at *11-12. Because Putnam did not
12 assert its CUSA claim until more than two years later—in January 2011—it was
13 untimely. *See Halbrecht v. Prudential-Bache Props., Inc.*, 1992 WL 336757, at *6
14 (D. Conn. July 25, 1991) (CUSA claim barred by statute of limitations where
15 complaint filed more than two years after the date on which plaintiffs discovered the
16 alleged fraud). For all of these reasons, the *Putnam* complaint should be dismissed
17 with prejudice in its entirety.

18 **III. ALL CLAIMS IN AFAC ARE TIME-BARRED.**

19 **A. AFAC’s 1933 Act Claims Are Untimely.**

20 As in *Maine State, Stichting*, and *Allstate*, both the one-year statute of
21 limitations and the three-year statute of repose applicable to AFAC’s 1933 Act
22 claims (Counts VI, VII, and VIII) expired before AFAC filed its complaint on April
23 1, 2011. First, all nine MBS at issue were offered to the public for purposes of
24 AFAC’s Section 11 claim more than three years before AFAC filed the complaint.

25 ²⁴ *See, e.g., Rota v. Colonial Realty/USA Corp.*, 1996 WL 434228, at *4 (Conn.
26 Super. Ct. July 17, 1996) (“[a]lthough CUSA and the federal securities laws are not
27 identical, in interpreting CUSA it is instructive to look to rulings of the federal
28 courts interpreting federal securities law, particularly where the language of CUSA
is similar to that of the federal law”); *Capri v. Murphy*, 856 F.2d 473, 479 (2d Cir.
1988) (“in the absence of state authority to the contrary, [CUSA] will be interpreted
similarly” to the federal securities laws when language is “virtually identical”).

1 See App. 9 (latest shelf registration statement at issue dated April 24, 2007; latest
2 prospectus supplement at issue dated June 28, 2007). Second, with respect to
3 AFAC’s Section 12(a)(2) claims, the three-year repose period had expired for seven
4 of the nine MBS purchased by AFAC before its complaint was filed, because those
5 purchases took place no later than February 7, 2008. AFAC FAC ¶ 32.²⁵ Moreover,
6 the one-year statute of limitations also had expired as to both Section 11 and Section
7 12(a)(2) claims because, as in *Maine State, Stichting*, and *Allstate*, AFAC
8 discovered or reasonably should have discovered the allegedly untrue statements
9 prior to April 1, 2010—*i.e.*, more than one year before its complaint was filed.²⁶

10 Acknowledging that its 1933 Act claims are otherwise time-barred, AFAC
11 asserts that *American Pipe* tolling applies to these claims by virtue of the filing of
12 the *Luther* and *Washington State* state court class actions. AFAC FAC ¶¶ 380-90.
13 AFAC’s argument lacks merit. As this Court has held, the only MBS eligible for
14 *American Pipe* tolling are those as to which “the named plaintiffs in the prior
15 putative class actions had standing to sue, *i.e.*, those tranches that the *Luther* named
16 plaintiffs had actually purchased.” *Allstate*, 2011 WL 5067128, at *1; *accord Maine*
17 *State II*, 2011 WL 4389689, at *2-8; *Stichting*, 2011 WL 3558173, at *2. AFAC
18 acknowledges in the Amended Complaint that its “investments appear not to overlap
19 with the investments of the named plaintiffs” in the *Luther* class action. AFAC FAC
20 ¶ 387. AFAC is correct—the *Luther* named plaintiffs did not purchase any MBS in
21 the tranches that AFAC purchased here. *Id.* ¶ 32; RJN Ex. 102; App. 9. As such,

22

²⁵ AFAC’s two remaining purchases in CWHL 2007-J2 and CWHL 2007-8 took
23 place on April 1, 2008 and May 1, 2008, respectively. AFAC FAC ¶ 32. Because
24 AFAC did not purchase these MBS in the initial public offerings, however—the
25 relevant offerings occurred almost a year earlier, on June 1, 2007—AFAC does not
26 have standing to assert Section 12(a)(2) claims based upon these two aftermarket
27 purchases, and these claims must be dismissed in any event. See *Maine State II*,
28 2011 WL 4389689, at *11; App. 9.

²⁶ See *Maine State I*, 722 F. Supp. 2d at 1165 (holding that Plaintiffs discovered the
basis for their 1933 Act claims no later than 2007-2008); *Stichting*, 2011 WL
3558173, at *8 (“Plaintiff was clearly on notice of Countrywide’s
misrepresentations regarding underwriting standards by late 2007 or early 2008”);
Allstate, 2011 WL 5067128, at *11 (same).

1 AFAC is not entitled to *American Pipe* tolling and its claims must be dismissed.

2 Finally, AFAC's claim for "control person" liability under Section 15 of the
3 1933 Act (Count XIII) also must be dismissed. AFAC FAC ¶¶ 458-66. To sustain a
4 claim under Section 15, AFAC must plead a primary violation of the 1933 Act.
5 *Allstate*, 2011 WL 5067128, at *13 (dismissing Section 15 claims where all possible
6 predicate violations were dismissed as time-barred). Because all of AFAC's Section
7 11 and 12(a)(2) claims are time-barred (or otherwise must be dismissed), its
8 corresponding Section 15 claims also fail and likewise must be dismissed. *Id.*²⁷

9 **B. AFAC's 1934 Act Claims Are Untimely.**

10 The applicable two-year statute of limitations applicable to AFAC's 1934 Act
11 claims (Counts I and II) also expired before AFAC filed its complaint on April 1,
12 2011. *See* 28 U.S.C. § 1658(b). The two-year statute of limitations begins to run
13 when "[p]laintiff either knew, or through the exercise of reasonable diligence should
14 have known, 'the facts constituting the violation.'" *Stichting*, 2011 WL 3558173, at
15 *6; *Allstate*, 2011 WL 5067128, at *11. In *Stichting*, this Court held that a
16 "reasonable plaintiff exercising reasonable diligence . . . should have discovered
17 facts sufficient to state every element of its [Section 10(b)] claim at least prior to
18 February 14, 2009," two years before that case was filed. *Stichting*, 2011 WL
19 3558173, at *11 (emphasis added); *accord Allstate*, 2011 WL 5067128, at *11
20 (dismissing Section 10(b) claim as time-barred because plaintiffs should have
21 discovered every element to state their claim by at least December 27, 2008, two
22 years before complaint filed). By definition, AFAC certainly should have
23 discovered facts sufficient to state its 1934 Act claims before *April 1, 2009*—more

24 ²⁷ With respect to Mr. Adler, AFAC attempts to ground potential Section 11 liability
25 on his alleged role as a "signatory" of the registration statements for four Offerings
(CWALT 2007-15CB, CWHL 2007-8, CWHL 2007-J2 and CWHL-2007-J3).
26 AFAC FAC ¶¶ 22, 442. Because the *Luther* plaintiffs did not purchase any
27 securities in these four Offerings, however, *Luther* could not have tolled the running
of the applicable limitations and repose periods. Any Section 11 claims against Mr.
Adler are thus time-barred. *See* RJD Ex. 102. And because AFAC's Section 11
claim against Countrywide must be dismissed as untimely, its Section 15 "control
person" claim against Mr. Adler also must be dismissed. *See supra*, at 20-21.

1 than two years prior to the filing of its complaint. *Id.* AFAC's Section 10(b) claims
2 are therefore time-barred.²⁸

3 Because the predicate Section 10(b) claims on which AFAC's Section 20(a)
4 claim is based (AFAC FAC ¶ 407) are untimely, the Court likewise should dismiss
5 the Section 20(a) control person claim as it did in *Stichting* and *Allstate*. *Stichting*,
6 2011 WL 3558173, at *11 (dismissing Section 20(a) claim because Section 10(b)
7 claims time-barred); *Allstate*, 2011 WL 5067128, at *13 (same).²⁹

8 **C. AFAC's Common Law Claims Are Untimely.**

9 Counts III, IV, and V allege claims for common law fraud, aiding and
10 abetting fraud, and negligent misrepresentation. AFAC FAC ¶¶ 409-32. Each of
11 these claims is untimely under the statutes of limitations of both Oklahoma and
12 California and must be dismissed with prejudice.

13 **1. Oklahoma's Choice-of-Law Rules Apply To AFAC's**
14 **Common Law Claims.**

15 “Where a transferee court presides over several diversity actions consolidated
16 under the multidistrict rules, the choice of law rules of each jurisdiction in which the
17 transferred actions were originally filed must be applied.” *In re Air Disaster at*
18 *Ramstein Air Base, Germany, on* 8/29/90, 81 F.3d 570, 576 (5th Cir. 1996).
19 Because this action was originally filed in the Western District of Oklahoma,
20 Oklahoma's choice of law rules must be applied to determine which statute of
21 limitations governs AFAC's common law claims. *See BancOklahoma Mortg. Corp.*
22 *v. Capital Title Co., Inc.*, 194 F.3d 1089, 1103 (10th Cir. 1999). In Oklahoma,
23 “when the question is which state's limitations period applies, choice of law
24 principles hold that it is ordinarily the limitations period of the forum state which

25

²⁸ AFAC's 1934 Act claim as to CWALT 2005-21CB also should be dismissed
26 because it is barred by the Act's five-year statute of repose. The relevant prospectus
27 supplement and shelf registration statement for this offering were filed with the SEC
in April 2005, more than five years before this suit was filed. *See supra*, at n. 23—
(citing *Exxon*, 500 F.3d at 200); RJD Ex. 9.

28 ²⁹ The 1934 Act claims against Mr. Adler are all time-barred for the same reasons.

1 applies.” *Thornton v. T&W Tire, L.P.*, 410 F. Supp. 2d 1098, 1101 (W.D. Okla.
2 2006); *Stephens v. Household Fin. Corp.*, 566 P.2d 1163, 1165 (Okla. 1977) (“As a
3 general rule the statute of limitations of the forum state applies.”); *see also Feldman*
4 *v. Pioneer Petroleum, Inc.*, 606 F. Supp. 916, 921 (W.D. Okla. 1985) (applying the
5 forum state’s law of limitations). Here, Oklahoma’s statute of limitations applicable
6 to AFAC’s fraud, aiding and abetting fraud, and negligent misrepresentation claims
7 is two years. 12 OKLA. STAT. ANN. § 95(A)(3).

8 But “Oklahoma law may require the Court to apply another state’s statute of
9 limitations” as a result of Oklahoma’s borrowing statute. *Feldman*, 606 F. Supp. at
10 921. Oklahoma’s borrowing statute provides that “[t]he period of limitation
11 applicable to a claim accruing outside of this state shall be that prescribed either by
12 the law of the place where the claim accrued or by the law of this state, whichever
13 last bars the claim.” 12 OKLA. STAT. ANN. § 105 (emphasis added).³⁰ For tort
14 claims, Oklahoma courts apply the “most significant relationship test” to determine
15 where a claim accrued for purposes of the borrowing statute. *Bernal v. Charter*
16 *County Mut. Ins. Co.*, 209 P.3d 309, 315-16 (Okla. 2009) (citing *Brickner v.*
17 *Gooden*, 525 P.2d 632 (Okla. 1974)); *Feldman*, 606 F. Supp. at 921-22.³¹

18 Here, one could argue that AFAC’s common law primary-liability claims
19 accrued in Oklahoma, where AFAC is allegedly domiciled and has its principal
20 place of business (AFAC FAC ¶ 7), or in California, where the complaint alleges all
21

22 ³⁰ The borrowing statute “essentially operates to preserve a remedy for an accrued
23 cause of action for the longest applicable time period,” which has “the opposite
24 effect of most borrowing statutes that select the earliest time bar.” *Consolidated*
Grain & Barge Co. v. Structural Sys., Inc., 212 P. 3d 1168, 1174 (Okla. 2009).

25 ³¹ In general, there are four factors Oklahoma courts consider under this test: (1) the
26 place where the injury occurred; (2) the place where the conduct causing the injury
27 occurred; (3) the domicile, residence, nationality, place of incorporation and place of
28 business of the parties; (4) the place where the relationship, if any, between the
parties occurred. *Brickner*, 525 P.2d at 637; *Feldman*, 606 F. Supp. at 921. For
actions that seek to recover damages based on allegedly false representations, the
Oklahoma Supreme Court applies Section 148 of the Restatement (Second) of
Conflict of Laws. See *Ysbrand v. DaimlerChrysler Corp.*, 81 P.3d 618, 626 (Okla.
2003). For a more detailed discussion of the Section 148 factors, see *infra* at 52-54.

1 of the Countrywide Defendants have their principal place of business (*id.* ¶¶ 8-11).
2 The Court need not resolve this question, however, because AFAC’s common law
3 claims are time-barred under the applicable limitations periods of *both* Oklahoma
4 and California.

5 **2. AFAC’s Fraud-Based Claims Are Untimely Under**
6 **California’s Three-Year Statute of Limitations.**

7 The statute of limitations for fraud-based claims in California is three years
8 from the discovery “of the facts constituting the fraud or mistake.” Cal. Code Civ.
9 P. § 338(d); *Stichting*, 2011 WL 3558173, at *12. Under the “lenient inquiry notice
10 standard” of California law, the statute of limitations begins to run “when the
11 plaintiff suspected or should have suspected that an injury was caused by
12 wrongdoing.” *Stichting*, 2011 WL 3558173, at *12; *accord Allstate*, 2011 WL
13 5067128, at *13. In *Stichting*, this Court applied California law and dismissed as
14 time-barred fraud and aiding and abetting claims that were based on facts *identical*
15 to those at issue here. *See* App. 2 (comparing allegations in *Stichting* to allegations
16 in AFAC’s FAC). Specifically, the Court found that the widespread public press
17 coverage and shareholder suits in August 2007, combined with the filing of actions
18 in November 2007 and January 2008, “were enough to alert a reasonable person to
19 wrongdoing in Countrywide’s loan origination business” prior to *February 2008*.
20 *Stichting*, 2011 WL 3558173, at *12. Accordingly, AFAC was on inquiry notice
21 prior to April 1, 2008, more than three years before the complaint was first filed, and
22 its primarily-liability fraud-based claims must be dismissed under California law.

23 **3. AFAC’s Fraud-Based Claims Are Untimely Under**
24 **Oklahoma’s Two-Year Statute Of Limitations.**

25 Oklahoma’s statute of limitations applicable to AFAC’s fraud-based claims is
26 two years. 12 OKLA. STAT. ANN. § 95(A)(3). As with its Section 10(b) claims, the
27 statute “begins to run when the aggrieved party discovers, or should have discovered
28 by the exercise of reasonable diligence, the facts constituting the fraud.” *Feldman*,

1 606 F. Supp. at 922; *accord In re Woodward*, 549 P.2d 1207, 1209 (Okla. 1976). In
2 *Stichting*, this Court held that a “reasonable plaintiff exercising reasonable diligence
3 . . . should have discovered facts sufficient to state every element of its [fraud] claim
4 at least prior to February 14, 2009.” *Stichting*, 2011 WL 3558173, at *11; *accord*
5 *Allstate*, 2011 WL 5067128, at *11. Thus, by definition, AFAC knew or reasonably
6 should have discovered facts sufficient to state its primary-liability fraud-based
7 claims well before April 1, 2009, and these claims are therefore time-barred under
8 Oklahoma’s statute of limitations as well as under California’s two-year period.

9 **4. AFAC’s Negligent Misrepresentation Claim Is Untimely.**

10 AFAC’s negligent misrepresentation claim is subject to a two-year statute of
11 limitations under either California or Oklahoma law. *See Platt Elec. Supply, Inc. v.*
12 *EOFF Elec., Inc.*, 522 F.3d 1049, 1055 (9th Cir. 2008) (“For negligent
13 misrepresentation, there is a two-year statute of limitations [in California].”); 12
14 OKLA. STAT. ANN. § 95(A)(3); *Downing Trucking, Inc. v. Cline Wood Agency, Inc.*,
15 2007 WL 2816200, at *6 (W.D. Okla. 2007) (“In Oklahoma, the statute of
16 limitations for asserting claims such as . . . negligent misrepresentation is two
17 years.”). Under California law, AFAC’s negligent misrepresentation claim is time-
18 barred for the same reasons that the negligent misrepresentation claim in *Stichting*
19 was held to be time-barred—*i.e.*, AFAC discovered or should have discovered the
20 basis for this claim before April 1, 2009—more than two years before the complaint
21 was initially filed. *See Stichting*, 2011 WL 3558173, at *13.

22 In Oklahoma, the two-year statute of limitations begins to run when the
23 plaintiff could first have maintained its action to a successful conclusion, which
24 requires a plaintiff to be able to “allege injury or damages that are certain and not
25 speculative.” *Marshall v. Fenton, Fenton, Smith, Reneau and Moon P.C.*, 899 P.2d
26 621, 623 (Okla. 1995). The plaintiff does not need to *sustain* damages for the
27 statute of limitations to begin running; rather, “the important moment in time is the
28 moment it becomes a certainty that a plaintiff will be damaged, even if the damage

1 will not occur for some time in the future.” *Fed. Deposit Ins. Corp. v. Grant*, 8 F.
2 Supp. 2d 1275, 1290-90 (N.D. Okla. 1998). Here, AFAC alleges that the alleged
3 misrepresentations “caused [it] damage because the Certificates were in fact far
4 riskier than Countrywide had described them to be.” AFAC FAC ¶ 256. Therefore,
5 as this Court has held, “[i]t follows that the injury accrued at the same time the
6 alleged misrepresentations came to light, not at the time the risk actually
7 materialized in the form of defaults or lower market values.” *Stichting*, 2011 WL
8 3558173, at *7. Because complaints filed by other plaintiffs and public press
9 reports make it clear that the alleged misrepresentations came to light “by early
10 2008,” *id.* at *8, and AFAC did not file its complaint until more than three years
11 later in April 2011, its negligent misrepresentation claim is time-barred under
12 Oklahoma’s statute of limitations.

13 **IV. VIRTUALLY ALL CLAIMS IN WESTERN & SOUTHERN
14 ARE TIME-BARRED.**

15 **A. Western & Southern’s 1933 Act Claims Are Untimely.**

16 As in *Maine State*, *Stichting*, and *Allstate*, both the one-year statute of
17 limitations and the three-year statute of repose applicable to Western & Southern’s
18 1933 Act claims expired before Western & Southern filed its original complaint on
19 April 27, 2011. First, all of the 36 MBS at issue here were offered to the public for
20 purposes of Western & Southern’s Section 11 claims prior to April 27, 2008. *See*
21 App. 10 (latest registration statement at issue dated April 24, 2007; latest prospectus
22 supplement at issue dated June 28, 2007). Second, with respect to Western &
23 Southern’s Section 12(a)(2) claims, all 36 MBS at issue were purchased by Western
24 & Southern by no later than March 25, 2008. W&S AC ¶ 75 & Ex. A; App. 10. As
25 such, the three-year repose period expired as to all 36 MBS.

26 In addition, the one-year statute of limitations also expired as to both Section
27 11 and Section 12 claims because, as in *Maine State*, *Stichting*, and *Allstate*,
28 Western & Southern discovered or should have discovered had it exercised

1 reasonable diligence the allegedly untrue statements prior to April 27, 2010—*i.e.*,
2 more than one year before its complaint was filed. *See Maine State I*, 722 F. Supp.
3 2d at 1165; *Stichting*, 2011 WL 3558173, at *8; *Allstate*, 2011 WL 5067128, at *10.

4 Western & Southern argues that the *Luther* and *Washington State* class
5 actions triggered *American Pipe* tolling. W&S AC ¶¶ 389-95.³² But as this Court
6 held in *Maine State*, *Stichting*, and *Allstate*, the only MBS eligible for *American*
7 *Pipe* tolling are those for which “the named plaintiffs in the prior putative class
8 actions had standing to sue, *i.e.*, those tranches that the *Luther* named plaintiffs had
9 actually purchased.” *Allstate*, 2011 WL 5067128, at *10; *accord Maine State II*,
10 2011 WL 4389689, at *2-8; *Stichting*, 2011 WL 3558173, at *2; *see also* W&S AC ¶
11 397-98 (acknowledging *Maine State I* and *Maine State II* standing rulings). Here,
12 however, no named *Luther* plaintiff purchased 34 of the 36 MBS (across 30 of the
13 32 offerings at issue) purchased by Western & Southern. *See* W&S AC ¶ 75 and Ex.
14 A; RJN Ex. 102. Western & Southern, therefore, is not entitled to *American Pipe*
15 tolling as to these 34 MBS, and its 1933 Act claims based on these offerings must be
16 dismissed under the Act’s one-year limitations period. *Allstate*, 2011 WL 5067128,
17 at *10 (citing *Stichting*, 2011 WL 3558173, at *2).³³

18 As to one of the two remaining MBS, CWALT 2005-26CB, Western &
19 Southern’s Section 11 claims are barred by the three-year statute of repose.
20

21 ³² Western & Southern also asserts that its 1933 Act claims are tolled under
22 *Vaccariello v. Smith & Nephew Richards, Inc.*, 94 Ohio St. 3d 380 (Ohio 2002), and
23 ORC § 2305.19. W&S AC ¶ 388. But state law limitations periods and tolling rules
24 do not apply to federal claims like the 1933 Act that have their own federal
25 limitations period. *Centaur Classic Conv. Arbitrage Fund Ltd. v. Countrywide Fin.*
26 *Corp.*, No. 10-CV-05699-MRP (MANx), slip op. at 6-7 (Jan. 20, 2011).

27 ³³ Even if Plaintiffs here were entitled to *American Pipe* tolling for their 1933 Act
28 claims as to CWALT 2005-J1 (which they are not), their Section 11 claims as to this
Offering would be time-barred in any event. The repose period for CWALT 2005-
J1 began to run on September 23, 2004, the effective date of the applicable shelf
registration statement, and thus expired on September 23, 2007. *See* App. 10. But
the *Luther* named plaintiff that purchased in this offering did not join *Luther* until
September 9, 2008—*after* the repose period had already expired. *See* RJN Ex. 72.
Thus, the repose period expired before any *American Pipe* tolling could have
possibly begun, and the Section 11 claims as to CWALT 2005-J1 are time-barred.

1 CWALT 2005-26CB was offered to the public on April 21, 2005, the effective date
2 of the relevant shelf registration statement. *See* App. 10. Accordingly, the repose
3 period expired on April 21, 2008. And no tolling applies to this claim—the *Luther*
4 complaint that included a named plaintiff that purchased the relevant tranche of
5 CWALT 2005-26CB was not filed until April 21, 2008, *after* the repose period
6 already had expired. *See* RJN Ex. 72; *Stichting*, 2011 WL 3558173, at *2 (“Plaintiff
7 may not assert §§ 11 or 12(a)(2) claims . . . for which the three-year statute of repose
8 expired before the *Luther* plaintiff either acquired the security or joined the *Luther*
9 case”).³⁴

10 And Western & Southern’s claim for “control person” liability under Section
11 15 of the 1933 Act also must be dismissed because the predicate Section 11 and
12 12(a)(2) claims on which this claim is based are time-barred. *See, e.g., Allstate*,
13 2011 WL 5067128, at *13 (dismissing Section 15 claims where all possible
14 predicate violations were dismissed as time-barred).

15 **B. Western & Southern’s 1934 Act Claims Are Untimely.**

16 The two-year statute of limitations applicable to Western & Southern’s 1934
17 Act claims also expired before Western & Southern filed its complaint on April 27,
18 2011. *See* 28 U.S.C. § 1658(b). In *Stichting*, this Court held that a “reasonable
19 plaintiff exercising reasonable diligence . . . should have discovered facts sufficient
20 to state every element of its [Section 10(b)] claim at least prior to February 14,
21 2009,” two years before the fraud claims in that case were filed. *Stichting*, 2011 WL
22 3558173, at *11 (emphasis added); *accord Allstate*, 2011 WL 5067128, at *11

23 ³⁴ Western & Southern alleges that Mr. Adler signed the registration statement for
24 seven Offerings (CWALT 2007-15CB, CWALT 2007-16CB, CWALT 2007-17CB,
25 CWALT 2007-21CB, CWHL 2007-14, CWHL 2007-15, and CWL 2007-11),
26 triggering Section 11 liability. W&S AC ¶¶ 36, 460. But the *Luther* plaintiffs did
27 not purchase the same tranches in these Offerings as Western & Southern did, *see*
28 RJN Ex. 102, and no *American Pipe* tolling applies to the Section 11 claims based
on these tranches. The Section 11 claims against Mr. Adler based upon these
Offerings thus must be dismissed. Moreover, because Mr. Adler is not alleged to
have signed the registration statement for CWHEQ 2006-S9 (purchased by both the
Luther plaintiffs and Western & Southern), he cannot be liable under Section 11
based upon this Offering.

1 (dismissing Section 10(b) claim as time-barred because plaintiffs should have
2 discovered every element to state their claim by no later than December 27, 2008).
3 By definition, Western & Southern too should have discovered facts sufficient to
4 state its Section 10(b) claim before *April 27, 2009*—more than two years prior to the
5 filing of its complaint. *Id.* Western & Southern’s Section 10(b) claim is therefore
6 time-barred.

7 Western & Southern attempts to end-run this Court’s rulings in *Allstate* and
8 *Stichting* by inserting an entirely new section in the Amended Complaint alleging
9 that it “did not know and could not have known of its claims prior to June 2009.”
10 *See W&S AC ¶¶ 12, 372-87.* Western & Southern argues that it developed and used
11 so-called “proprietary” models to perform “loan-level analysis” and “fair value
12 pricing” through June 2009 “to determine the likelihood and magnitude of any
13 losses it could expect to sustain” on the MBS they purchased. *Id.* ¶¶ 374-77.
14 Western & Southern further alleges that based on this analysis, as of April 2009, it
15 had “not impaired twenty-seven out of thirty-six tranches it owned (meaning as a
16 ‘buy and hold’ investor Western & Southern did not have notice that it would take
17 material losses on any Certificates [*i.e.*, the 27 tranches] it had not yet impaired).”
18 *Id.* ¶ 378. These new allegations provide no basis for avoiding this Court’s holdings
19 in *Stichting* and *Allstate*.

20 For one thing, according to the Amended Complaint itself, Western &
21 Southern now claims to have been on notice as of April 2009 that as to nine of the
22 MBS it purchased it allegedly would incur material losses. *Id.* As for the remaining
23 27 MBS, this Court has held that conclusions based on “complex and unverifiable
24 mathematical models” like what Western & Southern claims to have developed are
25 opinions, not *facts* previously unavailable to MBS investors. *Allstate*, 2011 WL
26 5067128, at *12. Those *facts* were available more than two years before the filing
27 of the *Western & Southern* complaint. Moreover, like the plaintiffs in both *Stichting*
28 and *Allstate*, Western & Southern alleges that it incurred injury immediately upon

1 purchasing the MBS at issue because these securities allegedly “were far riskier than
2 Defendants described, and for that reason, far less valuable than the prices [Western
3 & Southern] paid.” *W&S AC* ¶ 286; *see Stichting*, 2011 WL 3558173, at *7;
4 *Allstate*, 2011 WL 5067128, at *11. Accordingly, the date on which the statute of
5 limitations began to run is “coterminal” with the date Western & Southern knew or
6 reasonably should have known that “Countrywide’s statements about its lending
7 standards were [allegedly] false.” *Stichting*, 2011 WL 3558173, at *7.³⁵
8 Accordingly, whether Western & Southern’s “proprietary,” internal models
9 predicted losses as of any given date is irrelevant to determining the date on which
10 the 1934 Act statute of limitations began to run.³⁶

11 Like the plaintiff in *Stichting*, Western & Southern also argues that it could
12 not have discovered the facts underlying its 1934 Act claim until June 2009, when
13 “the SEC released internal Countrywide emails revealing conscious disregard for the
14 underwriting guidelines touted in the Offering Materials and a deliberate scheme to
15 originate toxic loans and sell them to unsuspecting investors.” *W&S AC* ¶ 385. *See*
16 *Stichting*, 2011 WL 3558173, at *8. This Court flatly rejected this argument in
17 *Stichting*, however, holding that the plaintiff was “not entitled to rely on the SEC
18 complaint as its ‘trigger’ event with respect to Countrywide’s alleged
19 misrepresentations regarding its underwriting practices.” *Id.* at *9. The Court
20 reasoned: “the gravamen of Plaintiff’s claim is that Countrywide wholly abandoned
21 its underwriting standards. The press and numerous widely reported lawsuits had
22 made exactly this allegation by the end of 2007.” *Id.*³⁷ The Court further explained

23

³⁵ *Accord Allstate*, 2011 WL 5067128, at *13 (rejecting argument that plaintiff could
24 not have been aware of its damages until its MBS were downgraded because “any
25 damages accrued when the truth regarding Countrywide’s underwriting practices
came to light,” which occurred “well before . . . December 27, 2008”).

26 ³⁶ For the same reasons, Western & Southern’s allegation that it “did not suffer any
diminution in interest or principal payments prior to February 2010 . . . and only six
27 of Western & Southern’s thirty-six tranches have suffered principal or interest
shortfalls to date” is likewise irrelevant. *W&S AC* ¶ 384.

28 ³⁷ Moreover, like the plaintiff in *Stichting*, Western & Southern cites the very same
press reports, investigations and other lawsuits in its complaint as ostensible support

1 that the “SEC complaint may perhaps include more detail than earlier-filed
2 complaints, but it does not contain any fundamentally new revelation. All the facts
3 alleged had been widely reported already[.]” *Id.* at *11.³⁸

4 Thus, as in *Stichting* and *Allstate*, Western & Southern reasonably should
5 have discovered the factual basis for its Section 10(b) claims long before April 27,
6 2009, two years prior to the filing of the Complaint. *See Stichting*, 2011 WL
7 3558173, at *8, 11.³⁹ Because these predicate Section 10(b) claims must be
8 dismissed as time-barred, Western & Southern’s Section 20(a) claim likewise must
9 be dismissed. *See Stichting*, 2011 WL 3558173, at *11; *Allstate*, 2011 WL
10 5067128, at *13; W&S AC ¶ 456 (Section 20(a) claim predicated on alleged
11 violation of Section 10(b)).

12 **C. Western & Southern’s Ohio Securities Act Claims Are Untimely.**

13 Western & Southern’s five claims under the Ohio Securities Act (“OSA”)
14 must be dismissed because the applicable two-year statute of limitations had long
15 expired by the time it filed its complaint in April 2011. The OSA bars “any
16 recovery based upon or arising out of a sale or contract for sale . . . more than *two*
17 years after the plaintiff knew, or had reason to know, of the facts by reason of which
18 the actions of the person or director were unlawful, or more than *five years* from the
19 date of such sale or contract for sale, whichever is the shorter period.” OHIO REV.
20 CODE ANN. § 1707.43(B) (2011) (emphasis added). As the Sixth Circuit has

21
22 for its fraud allegations. *See, e.g.*, W&S AC ¶¶ 165-66, 168-69.

23 ³⁸ To the extent plaintiffs in other actions argue that they could not have reasonably
24 discovered the facts underlying their claims until the SEC publicly disclosed certain
25 Countrywide documents and/or testimony when it filed its complaint in June 2009
(*see, e.g.*, *Putnam Compl.* ¶¶ 86, 118; *AFAC FAC* ¶ 104, 136; *Bankers Compl.* ¶¶ 9,
65; *Sterling Compl.* ¶ 9; *Sealink Compl.* ¶ 6), such arguments likewise fail under
this Court’s holdings in *Stichting* detailed above.

26 ³⁹ Western & Southern’s 1934 Act claims as to 15 of the offerings at issue should
27 also be dismissed because they are barred by the five-year statute of repose
governing such claims. *See Stichting*, 2011 WL 3558173, at *6; App. 10. The
relevant prospectus supplements and shelf registration statements for each of these
28 15 offerings were filed with the SEC before April 27, 2006, more than five years
before this suit was filed. *See id.; supra*, at n. 23 (citing *Exxon*, 500 F.3d at 200).

1 explained “because Ohio has adopted a limitations period specific to claims arising
2 out of the sale of securities . . . Ohio courts would apply a standard consistent with
3 the . . . standard applicable to similar federal securities fraud claims.” *Wyser-Pratte*
4 *Mgmt Co. v. Telxon Corp.*, 413 F.3d 553, 561-64 (6th Cir. 2005); *see also Cain v.*
5 *Mid-Ohio Securities, Inc.*, 2007 WL 2080553 at *2-3 (Ohio App. 9 Dist. July 23,
6 2007) (applying standard applicable to federal securities claims and dismissing OSA
7 claims as time-barred). Accordingly, the OSA’s two-year statute of limitations
8 begins to run when the plaintiff discovers, or should have discovered through the
9 exercise of reasonable diligence, the facts underlying the alleged fraud.

10 Applying the analogous federal standard under the 1934 Act, this Court held
11 in *Stichting* that a “reasonable plaintiff exercising reasonable diligence . . . should
12 have discovered facts sufficient to state every element of its [Section 10(b)] claim at
13 least prior to *February 14, 2009*.” *Stichting*, 2011 WL 3558173, at *11 (emphasis
14 added); *accord Allstate*, 2011 WL 5067128, at *11-13 (dismissing Section 10(b)
15 claim as time-barred because plaintiffs should have discovered every element to
16 state their claim by December 27, 2008). Thus, it necessarily follows that Western
17 & Southern should have discovered facts sufficient to state its OSA claims prior to
18 April 27, 2009, and as a result these claims are time-barred and must be dismissed.
19 *See Stichting*, 2011 WL 3558173, at *11; *Metz v. Unizan Bank*, 649 F.3d 492, 499
20 (6th Cir. 2011) (dismissing OSA claims because “Plaintiffs should have discovered
21 any alleged misconduct by the defendant banks” more than two years before filing
22 their complaint).

23 Western & Southern argues that its OSA claims are tolled under *Vaccariello*
24 *v. Smith & Nephew Richards, Inc.*, 763 N.E.2d 160 (Ohio 2002), Ohio’s state law
25 counterpart to *American Pipe* tolling. W&S AC ¶ 388. In *Vaccariello*, the Ohio
26 Supreme Court adopted class action tolling but narrowly confined it, holding that
27 “the filing of a class action . . . **in Ohio or the federal court system**[] tolls the
28 statute of limitations as to all asserted members of the class who would have been

1 parties had the suit been permitted to continue as a class action.” 763 N.E.2d at 163
2 (emphasis added). Because the *Luther* and *Washington State* class actions were
3 filed in ***California state court***, and not “in Ohio or the federal court system,” they
4 did not toll the applicable statute of limitations under *Vaccariello*. *Id.*; accord
5 *Arandell Corp. v. American Elec. Power Co.*, 2010 WL 3667004, at *10 (S.D. Ohio
6 Sept. 15, 2010) (no tolling where class action was initially filed in Wisconsin state
7 court and later removed to federal court); *Thornton v. State Farm Mut. Auto Ins.
Co.*, 2006 WL 3359448, at *8 (N.D. Ohio Nov. 17, 2006) (because class action was
9 commenced in Illinois, not in Ohio or federal court, it did not toll statute of
10 limitations).⁴⁰

11 Although the *Maine State* class action was filed in federal court, it likewise
12 has no tolling effect under *Vaccariello* because the statute of limitations had already
13 expired by the time *Maine State* was filed on January 14, 2010. As this Court held
14 in *Stichting*, Western & Southern was “clearly on notice of Countrywide’s
15 misrepresentations regarding underwriting standards by late 2007 or early 2008.”
16 2011 WL 3558173, at *8. Western & Southern’s claims therefore accrued more
17 than two years before *Maine State* was filed. Where, as here, “the applicable two-
18 year statute of limitations expired before th[e] class action was filed,” the class

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20 ⁴⁰ Western & Southern also asserts that the filing of *Luther* and *Washington State*
21 provide tolling due to O.R.C. §2305.19, Ohio’s “savings statute.” W&S AC ¶ 388-
22 95. That statute provides: “In any action that is commenced or attempted to be
23 commenced, if in due time a judgment for the plaintiff is reversed or if the plaintiff
fails otherwise than upon the merits, the plaintiff . . . may commence a new action
24 within one year after the date of the reversal of the judgment or the plaintiff’s failure
otherwise than upon the merits or within the period of the original applicable statute
25 of limitations, whichever occurs later.” OHIO REV. CODE ANN. § 2305.19(A)
(2010). The savings statute, however, is entirely irrelevant here. First, this is not a
26 situation where a timely filed action was dismissed and the plaintiff seeks to re-file
within the savings period. Second, the savings statute applies only where the initial
27 action is filed in Ohio or in the federal courts—here, *Luther* and *Washington State*
were filed in a California state court. See *Vacciarello*, 763 N.E.2d at 162 (§2305.19
28 “applies only to actions ‘commenced or attempted to be commenced’ in Ohio within
the appropriate statute of limitations”) (*citing Howard v. Allen*, 283 N.E.2d 167
(Ohio 1972)); *Ruble v. Ream*, 2003 WL 22532858, at *7 (Ohio App. 4th Dist. Oct.
29, 2003) (holding that tolling under Ohio savings statute did not apply to action
initially brought in West Virginia).

1 action has no tolling effect. *Wyser-Pratte*, 413 F.3d at 568. Moreover, *Maine State*
2 cannot be the basis for class action tolling in any event because the *Maine State*
3 named plaintiffs lacked standing as to the MBS purchased by Western & Southern.
4 *See supra*, at 11-13; RJN Ex. 102.⁴¹

5 Finally, Western & Southern contends that the OSA statute of limitations was
6 equitably tolled due to alleged “fraudulent concealment.” *W&S AC* ¶ 383-87. This
7 argument likewise fails. Under Ohio law, fraudulent concealment may be used as
8 grounds for equitable tolling *only* where the plaintiff alleges facts showing “(1) that
9 [defendant] engaged in a course of conduct to conceal evidence of the alleged
10 wrongdoing; and (2) that [plaintiff] failed to discover the facts giving rise to the
11 claim despite the exercise of due diligence.” *Frees v. ITT Technical School*, 2010
12 WL 4323026, at *5 (Ohio App. 2 Dist. Oct. 29, 2010); *see also Hoover v. Langston*
13 *Equip. Assocs.*, 958 F.2d 742, 744-45 (6th Cir. 1992). Equitable tolling due to
14 fraudulent concealment is an extraordinary remedy that “is only available in
15 compelling cases which justify a departure from established procedure.” *Frees*,
16 2010 WL 4323026, at *5. Mere silence from a defendant thus will not toll a
17 plaintiff’s claims—rather, there must be “some affirmative act by the defendant
18 designed to prevent discovery of the cause of action.” *Thornton*, 2006 WL
19 3359448, at *1. Moreover, because fraudulent concealment only tolls claims when
20 plaintiffs have failed to discover fraud despite the exercise of due diligence, “[o]nce
21 sufficient indicia of fraud are shown, a party cannot rely on its unawareness or the
22 efforts of the opposition to lull it into a false security to toll the statute.” *Zemcik v.*
23 *LaPine Truck Sales & Equip. Co.*, 706 N.E.2d 860, 866 (Ohio Ct. App. 1998)
24 (finding statute of limitations was not tolled once plaintiff had constructive
25 knowledge of fraud).

26 Here, Western & Southern meets none of the requirements for equitable
27

28⁴¹ As of January 2010, the named plaintiffs in *Maine State* were identical to the
Luther named plaintiffs, except that David Luther was not a plaintiff in *Maine State*.

1 tolling based on fraudulent concealment. First, Western & Southern has failed to
2 plead facts showing that Countrywide engaged in any conduct designed to conceal
3 the alleged fraud. Although Western & Southern includes in its amended complaint
4 a single, conclusory allegation that a “robo-signing conspiracy” obscured the
5 existence of its claims (*W&S AC ¶ 387*), it pleads no facts whatsoever explaining
6 how this alleged “robo-signing” is relevant to its allegations about how the loans
7 backing the MBS it bought were originated, much less how this “robo-signing”
8 prevented it from discovering the fraud that it alleges. Nor could it, given that many
9 other plaintiffs filed complaints years before it did based on exactly the same
10 wrongdoing it alleges was “concealed.” *See supra* at 11-17. Indeed, this Court
11 already has ruled that MBS investors exercising reasonable diligence would have
12 discovered the facts giving rise to their claims no later than late 2007 or early 2008.
13 *Stichting*, 2011 WL 3558173 at *8; *Maine State I*, 722 F. Supp. 2d 1157, 1165-66
14 (C.D. Cal. 2010). Accordingly, equitable tolling is inapplicable here.

15 **D. Western & Southern’s Common Law Claims Are Untimely.**

16 **1. The Relevant Choice Of Law Analysis Requires**
17 **Application Of Ohio’s Statute Of Limitations.**

18 Because Ohio is the transferor forum, this Court must apply its choice of law
19 rules in assessing the timeliness of Western & Southern’s common law claims.⁴²
20 Ohio has adopted the Restatement (Second) of Conflict of Laws (the
21 “Restatement”). *See Morgan v. Biro Mfg. Co., Inc.*, 474 N.E.2d 286, 288-89 (Ohio
22 1984) (“[w]e hereby adopt the theory stated in the Restatement of the Law of
23 Conflicts, as it is more reflective of our past decisions and also provides sufficient
24 guidelines for future litigation”). With respect to conflicts involving statutes of
25 limitations, Ohio applies Section 142 of the Restatement. *Sonic Auto., Inc. v.*

26

27 ⁴² *In re Air Disaster at Ramstein Air Base, Germany*, 81 F.3d at 576; *Toll Bros., Inc.*
28 *v. Dryvit Sys., Inc.*, 432 F.3d 564, 568 n.4 (4th Cir. 2005) (applying law of transferor
state); *In re Gen. Am. Life Ins. Co. Sales Practices Litig.*, 391 F.3d 907, 911 (8th
Cir. 2004) (same).

1 *Chrysler Ins. Co.*, 2011 WL 4063020, at *5-6 (S.D. Ohio Sept. 13, 2011). Although
2 there is some disagreement (which the Ohio Supreme Court has not yet addressed)
3 as to whether the original, 1971 version of Section 142 or the 1988 revised version
4 should be applied, the “majority position adopted by both state and federal courts
5 applying Ohio law” is that the 1971 version of Section 142 applies. *Id.* at *6.

6 The 1971 version of Section 142 provides: “An action will not be maintained
7 if it is barred by the statute of limitations of the forum, including a provision
8 borrowing the statute of limitations of another state.” Restatement (Second)
9 Conflict of Laws § 142(1) (1971). Ohio’s borrowing statute provides:

10 No civil action that is based upon a cause of action that accrued in any
11 other state, territory, district or foreign jurisdiction may be commenced
12 and maintained in this state if the period of limitation that applies to
13 that action under the laws of that other state, territory, district or foreign
14 jurisdiction has expired or the period of limitation that applies to that
15 action under the laws of this state has expired.

16 OHIO REV. CODE ANN. § 2305.03(B) (2005). Thus, under Ohio’s borrowing statute,
17 “if either Ohio’s statute of limitations or the limitations period of the state where the
18 cause of action accrued has expired, the action should be dismissed.” *Dudek v.*
19 *Thomas & Thomas Att’ys & Counselors at Law, LLC*, 702 F. Supp. 2d 826, 835-36
20 (N.D. Ohio 2010) (emphasis added). As a result, because Ohio’s statute of
21 limitations bars Western & Southern’s primary-liability common law claims, the
22 Court need not consider the statutes of limitation of any other jurisdiction, *see Sonic*,
23 2011 WL 4063020, at *6, and Western & Southern’s claims must be dismissed.⁴³

24

⁴³ Given the allegations in the *Western & Southern* complaint, the only other
25 conceivable state in which its claims could have accrued for purposes of the Ohio
26 borrowing statute is California, where Countrywide had its principal place of
27 business. As in *Stichting*, however, Western & Southern’s primary-liability
28 common law claims would nevertheless be time-barred under California’s three-
year statute of limitations for fraud and two-year statute of limitations for negligent
misrepresentation. *See* 2011 WL 3558173, at *12-13; *see also infra*, at 58-59
(analyzing California law).

1 **2. Western & Southern's Common Law Claims Are Barred By**
2 **The OSA's Two-Year Statute Of Limitations.**

3 Western & Southern's claims for common law fraud and negligent misrepre-
4 sentation are also time-barred. Although Ohio's four-year statute of limitation
5 generally applies to common law fraud and negligent misrepresentation claims, *see*
6 *Washington v. Spitzer Mgmt. Inc.*, 2003 WL 1759617, at *5 (Ohio App. 8 Dist. Apr.
7 3, 2003), "Ohio law is clear that [when] fraud claims arise out of or are predicated
8 on the sale of securities, they are governed by the specific statute of limitations set
9 forth in OHIO REV. CODE § 1707.43(B); not the four-year general statute of
10 limitations for fraud claims found in Ohio Rev. Code § 2305.09." *Wyser-Pratte*,
11 413 F.3d at 561. The same rule applies to negligent misrepresentation claims based
12 on the sale of securities. *Wuliger v. Anstaett*, 363 F. Supp. 2d 917, 933-35 (N.D.
13 Ohio 2005) (applying OSA's two-year statute of limitations to negligent
14 misrepresentation claim where representations concerned investments). And the
15 two-year statute of limitations applies regardless of how Western & Southern styled
16 its claims, as Ohio courts "look to the actual nature or subject matter of the case,
17 rather than the form in which an action is pleaded, to determine the applicable
18 limitations period." *Helman v. EPL Prolong, Inc.*, 743 N.E.2d 484, 493-94 (Ohio
19 Ct. App. 2000) (applying OSA's two-year statute of limitations to contract action
20 where claim was "based upon and inextricably interwoven with a fraudulent sale of
21 securities"); *Goldberg v. Cohen*, 2002 WL 1371031, at *3 (Ohio App. 7 Dist. June
22 13, 2002) (same).

23 Here, not only do Western & Southern's common law fraud and negligent
24 misrepresentation claims arise out of the allegedly fraudulent sale of securities, they
25 are based on precisely the same alleged conduct that forms the basis of Western &
26 Southern's OSA claims. *Compare W&S AC ¶ 434* (negligent misrepresentation
27 claim: "Defendants . . . made misrepresentations which they knew, or were
28 negligent in not knowing at the time to be false, in order to induce Western &

1 Southern's investment in the Offerings") with *id.* ¶ 402 (OSA claim: "[a]s a result
2 of Defendants' dissemination of materially false and misleading information and
3 their failure to disclose material facts, Western & Southern was misled"). Western
4 & Southern's common law fraud and negligent misrepresentation claims are thus
5 subject to the OSA's two-year statute of limitations, and are time-barred for the very
6 same reasons its OSA claims are time-barred. *See supra*, at 32-34.

7 Asserted for the first time in its Amended Complaint, Western & Southern's
8 civil conspiracy claim is also barred by the OSA's two-year statute of limitations.
9 Where, as here, a civil conspiracy claim shares "the same factual basis" as alleged
10 OSA and fraud claims, it is subject to the same two-year statute of limitations as
11 those claims. *See Hardin v. Reliance Trust Co.*, 2006 WL 285045, at *11 (N.D.
12 Ohio Sept. 29, 2006) (applying OSA's two-year statute of limitations to civil
13 conspiracy claim based on same allegations as securities fraud claim). In analyzing
14 the proper limitations period for a civil conspiracy claim, the Court must "examin[e]
15 the nature of the underlying cause of action." *Michael v. Michael*, 2000 WL
16 1005209, at *3 (Ohio Ct. App. July 21, 2000) (applying one-year limitations period
17 for assault to claim for conspiracy to commit fraud because "the nature of the claim
18 [was] based upon assault and battery").

19 Here, Western & Southern alleges that Defendants "conspired to underwrite
20 and purchase fraudulently and improperly underwritten loans, to package those
21 loans for resale, and to fraudulently service such loans through use of fraudulent and
22 forged documents in foreclosures and overcharges to borrowers for insurance and
23 other services." W&S AC ¶ 497. This is precisely the same alleged conduct
24 underlying Western & Southern's OSA and fraud claims. *See id.* ¶¶ 402, 491.
25 Accordingly, the OSA's two-year statute of limitations applies and bars Western &
26 Southern's civil conspiracy claims, and its "belated claim of conspiracy to thwart
27 the bar of the short statute of limitations does not advance the plaintiff's cause."
28 *Krause v. Case Western Reserve Univ.*, 1996 WL 732537, at *10 (Ohio Ct. App.

1 Dec. 19, 1996)

2 **V. THE NATIONAL INTEGRITY ACTION SHOULD BE DISMISSED IN**
ITS ENTIRETY OR IN SUBSTANTIAL PART.

3

4 Apparently realizing that the vast majority of its claims—including *all* of its
5 federal and primary-liability common law claims—would be dismissed under
6 Ohio’s applicable statutes of limitation (for the reasons explained *supra*, at 32-39),
7 National Integrity recently dropped out of the *Western & Southern* action and filed a
8 new, separate (but substantively identical) action in the Southern District of New
9 York on November 9, 2011. National Integrity’s newly filed action should be
10 dismissed as blatant forum shopping that, if permitted, would result in inefficient,
11 duplicative litigation of identical claims involving identical parties and witnesses.
12 In any event, even if the *National Integrity* action were not dismissed for this reason,
13 all but one of the claims in that action are untimely for the same reasons that
14 Western & Southern’s claims are untimely.

15 **A. The Recently-Filed New York Action Was Procedurally Improper**
And Should Be Dismissed.

16 **1. Dismissal Is Appropriate Where Plaintiffs Forum Shop**
Identical Claims In Different Forums.

17 A district court has inherent discretion to dismiss an action to control its
18 docket. *Curtis v. Citibank, N.A.*, 226 F.3d 133, 138 (2d Cir. 2006). “[T]he Second
19 Circuit has noted that . . . a district court is required to ‘consider the equities of the
20 situation when exercising its discretion.’” *Raniere v. Citigroup Inc.*, 2011 WL
21 5881926, at *3 (S.D.N.Y. Nov. 22, 2011). In this regard, the Supreme Court has
22 “stress[ed] the importance of conservation of judicial resources and the
23 comprehensive disposition of litigation.” *Genentech, Inc. v. Eli Lilly & Co.*, 998
24 F.2d 931, 938 (Fed. Cir. 1993) (citing *Kerotest Mfg. Co. v. C-O-Two Fire Equip.*
25 *Co.*, 342 U.S. 180, 183 (1952)).

26 In considering whether the equities favor dismissal of a subsequently filed
27 suit, courts apply the following factors:

(1) the convenience of witnesses; (2) the location of relevant documents and the relative ease of access to sources of proof; (3) the convenience of the parties; (4) the locus of the operative facts; (5) the availability of process to compel attendance of unwilling witnesses; (6) the relative means of the parties; (7) a forum's familiarity with the governing law; (8) the weight accorded a plaintiff's choice of forum; and (9) trial efficiency and the interests of justice, based on the totality of the circumstances.

8 *Kellen Co. v. Calphalon Corp.*, 54 F. Supp. 2d 218, 221 (S.D.N.Y. 1999); *accord*
9 *Dunn & Fenley, LLC v. Diederich*, 2010 WL 28662, at *2 (D. Ore. Jan. 5, 2010)
10 (listing comparable factors identified by the Ninth Circuit). Application of these
11 factors, for example, has led to dismissal of a second-filed suit in New York that
12 “involv[ed] the same issues, the same parties, and the same subject matter” as a suit
13 first-filed in Ohio federal court. *Kellen*, 54 F. Supp. 2d at 222 (dismissal of the
14 later-filed action discouraged “wasteful use of [judicial] resources”).

15 Where a plaintiff has engaged in forum shopping, its choice of forum is not
16 entitled to deference and should be disregarded. *See Aguiar v. Natbony*, 2011 WL
17 1873590, at *7 (S.D.N.Y. May 16, 2011).⁴⁴ And a plaintiff’s filing of a subsequent
18 suit to avoid the application of the first forum’s statute of limitations—like the filing
19 of the *National Integrity* suit here—epitomizes forum shopping. *See Merrick Bank*
20 *Corp. v. Savvis, Inc.*, 2008 WL 5146545, at *5 (E.D. Mo. Dec. 8, 2008).⁴⁵ As the

21 ⁴⁴ “[T]he Ninth Circuit has established that courts should disregard a plaintiff’s
22 forum choice where the suit is a result of forum-shopping.” *Italian Colors Rest. v.*
23 *Am. Express Co.*, 2003 WL 22682482, at *4 (N.D. Cal. Nov. 10, 2003) (citing
24 *Alltrade. Inc., v. Uniweld Prods., Inc.*, 946 F.2d 622, 628 (9th Cir. 1991)). And
25 courts in the Southern District of Ohio (National Integrity’s first choice of forum)
conduct complained of occurred in the forum selected by the plaintiff.” *Am.
Signature Inc. v. Moody’s Investors Servs., Inc.*, 2010 WL 2667367, at *2 (S.D.
Ohio July 2, 2010) (internal quotations and citations omitted).

⁴⁵ Although *Merrick* involved a more typical case where a defendant in the first-filed action engages in forum shopping, the rule applies equally where the same plaintiff has brought successive suits in different fora. *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1202-03 (2d Cir. 1970); *Kellen*, 54 F. Supp. 2d at 223 (plaintiffs' choice of forum should be disregarded "[w]hen they see a storm brewing in the first court, they try to weigh anchor and set sail for the hopefully more

1 district court in *Oglesby v. County of Kern*, 2005 WL 3031466, at *7 (E.D. Cal.
2 Nov. 4, 2005), said in words entirely apt here:

3 The Court seriously doubts how Plaintiffs' filing suit in another forum in
4 order to avoid unfavorable precedent applicable only to the original forum is
5 not garden-variety forum shopping. *See BLACK'S LAW DICTIONARY* 655 (6th
6 ed. 1990) ("Forum shopping. Such occurs when a party attempts to have his
7 action tried in a particular court or jurisdiction where he feels he will receive
8 the most favorable judgment or verdict.").

9 **2. The Equities Favor Dismissal of National Integrity's**
10 **Second Filed Suit.**

11 Here, a balancing of the equities weighs heavily in favor of dismissal.
12 Indeed, *every one* of the non-neutral factors support dismissal.

13 More specifically, National Integrity was one of the six initial plaintiffs in the
14 *Western & Southern* litigation. It joined its affiliates and parent⁴⁶ in bringing suit in
15 the Southern District of Ohio on April 27, 2011. Over its objection, National
16 Integrity's (and its affiliates') claims were transferred to this Court for pre-trial
17 purposes as part of the Countrywide MBS MDL, to be returned to Ohio for trial
18 barring further order of the MDL Court. *See Western & Southern*, No. 11-cv-7166,
19 Dkt. Nos. 75 (National Integrity opposition to transfer), 100 (MDL Order
20 transferring cases for pre-trial purposes), and 102 (Judge Spiegel order denying
21 transfer pursuant to 28 U.S.C. §1404(a)). On November 8, 2011, National
22 Integrity's affiliates filed an amended complaint in *Western & Southern*. Although
23 originally part of this same action, National Integrity filed the NI Complaint in
24 federal court in New York City a short time later. National Integrity admits,
25 however, that its separate action "involve[s] the same defendants, the same legal

26
27 favorable waters of another district.") (quoting *Semmes*).
28 ⁴⁶ *See W&S Compl. ¶ 23* (National Integrity "is a wholly-owned subsidiary of
 Integrity Life Insurance Company").

1 claims and substantially the same substantive factual allegations” as the *Western &*
2 *Southern* Amended Complaint. Dkt. No. 143, at 2. That is an understatement: the
3 *National Integrity* Complaint contains *precisely the same* allegations against
4 *precisely the same* defendants concerning *precisely the same* MBS purchases that
5 are identified in the *Western & Southern* Complaint. *Compare W&S Compl. Ex. B*
6 *with NI Compl. Ex. A.*⁴⁷ By its own admission, National Integrity has attempted to
7 change forum here solely “to avail itself of certain rights” it hopes to trigger by
8 filing in New York. Dkt. No. 143, at 2.

9 Given this context, all the relevant factors support dismissal. As Countrywide
10 previously argued to Southern District of Ohio Judge Spiegel, California is a more
11 appropriate forum for the convenience of witnesses, access to proof, and the locus of
12 primary-liability operative facts. *W&S* Dkt. No. 54, at 15-19. National Integrity
13 disagreed. It did not argue that any witness resided, proof could be found, or
14 conduct occurred in New York. Instead, it asserted “that Countrywide actively
15 marketed its mortgage-backed securities to [National Integrity and its affiliates,
16 collectively “Western & Southern”] *in Ohio*, including transmitting marketing
17 materials into the state. Western & Southern purchased the securities *in Ohio* and
18 such investments continue to be managed from Western & Southern’s headquarters
19 *in Cincinnati.*” Dkt. No. 75, at 11-12 (emphasis added).⁴⁸ Moreover, in three other
20

21 ⁴⁷ Exhibit B to the *Western & Southern* complaint alleges that the very same tranche
22 in each of the 37 MBS offerings that the other Western & Southern companies
23 bought was also purchased on the same day by one or more National Integrity
24 affiliates. The *Western & Southern* amended complaint and the *National Integrity*
25 complaint challenge exactly the same statements in exactly the same prospectus
supplements and registration statements for exactly the same offerings, but without
explanation the *Western & Southern* amended complaint no longer seeks relief as to
the CWALT 2007-15CB A6 tranche. *Compare NI Compl. Ex. B at 17-18 with*
W&S AC Ex. B at 27-28.

26 ⁴⁸ National Integrity cannot now in fairness contradict its prior argument to the
federal district court in Ohio that the relevant facts occurred in Ohio. Indeed,
27 National Integrity itself has asserted that a party is “judicially estopped from
arguing” a position contrary to one it has previously proffered. *Id.* at 15 (quoting
New Hampshire v. Maine, 532 U.S. 742, 749 (2001)). National Integrity’s own
28 words describe its conduct here precisely.

1 recent instances, National Integrity has joined with its affiliates in filing suit *in*
2 *Ohio*—not New York—challenging other purchases of other MBS issued by
3 different entities.⁴⁹ And National Integrity’s most recent complaint against
4 Countrywide alleges that National Integrity’s “senior management” and “portfolio
5 managers” are located in the forum it first chose, *Ohio*, and its “investment
6 decisions, including the decision to purchase Certificates, are made by National
7 Integrity officials or its affiliates in *Cincinnati, Ohio.*” NI Compl. ¶¶ 16-18
8 (emphasis added). Accordingly, National Integrity cannot now argue that the
9 convenience of the witnesses, or the parties, or the locus of documents or operative
10 facts concerning its primary-liability claims, is not in Ohio, but in New York
11 instead.

12 The other *Kellen* factors are neutral or also favor dismissal.⁵⁰ National
13 Integrity cannot credibly argue that a New York forum would have more familiarity
14 than Ohio as to the Ohio statutory law at issue in the first seven counts of its
15 Complaint. National Integrity’s blatant forum shopping also precludes giving any
16 weight to its newest choice of forum. *See, e.g., Semmes Motors, Inc.*, 429 F.2d at
17 1202-03; *Aguiar*, 2011 WL 1873590, at *7; *Merrick Bank Corp.*, 2008 WL
18 5146545, at *5; *Italian Colors Rest.*, 2003 WL 22682482, at *4. Finally, what
19 National Integrity has attempted to do by filing a new action in New York despite its
20 prior pending action before this Court in the *Countrywide MBS MDL* would spawn
21 gross judicial inefficiency, asking two courts and potentially two juries to address
22 precisely the same claims against identical defendants involving precisely the same
23 conduct relating to the same tranches of the same MBS offering that were purchased

24 ⁴⁹ *See* Complaint, *Western & Southern Life Ins. Co. v. JPMorgan Chase Bank, N.A.*,
25 11-CV-000495-SJD (Ct. C.P. Ohio June 22, 2011); Complaint, *Western & Southern*
26 *Life Ins. Co. v. Morgan Stanley Mortg. Cap. Inc.*, 11-CV-00576-SAS-KLL (Ct. C.P.
27 Ohio July 18, 2011); Complaint, *Western & Southern Life Ins. Co. v. Bank of*
28 *America, N.A.*, 11-CV-00667-SAS-SKB (Ct. C.P. Ohio Aug. 18, 2011). In each of
these cases, National Integrity lists its residence as 400 Broadway, Cincinnati, Ohio.

⁵⁰ The availability of process and the relative means of the parties to litigate in the
Southern District of Ohio are neutral factors.

1 on precisely the same days by the same or affiliated portfolio managers located in
2 precisely the same state (Ohio). *Compare W&S Compl. Ex. A with NI Compl. Ex.*
3 A. Accordingly, the *National Integrity* complaint should be dismissed to avoid such
4 judicial inefficiency and not reward National Integrity's blatant forum shopping.

5 **B. Virtually All Of National Integrity's Claims Are Time-Barred.**

6 **1. National Integrity's 1933 Act Claims Are Untimely.**

7 The *National Integrity* complaint should be dismissed for the separate and
8 independent reason that it is time-barred. As in *Maine State, Stichting, and Allstate*,
9 both the one-year statute of limitations and the three-year statute of repose
10 applicable to National Integrity's 1933 Act claims expired before National Integrity
11 filed its original Complaint on April 27, 2011. First, all 26 MBS at issue here were
12 offered to the public for purposes of National Integrity's Section 11 claims prior to
13 November 9, 2008. *See App. 11* (latest registration statement at issue dated April
14 24, 2007; latest prospectus supplement at issue dated July 27, 2007). Second, with
15 respect to National Integrity's Section 12(a)(2) claims, all 26 MBS at issue were
16 purchased by National Integrity by no later than March 25, 2008. *NI Compl. ¶ 75*
17 and Ex. A; *App. 11*. As such, the three-year repose period has expired as to all 26
18 MBS.

19 In addition, the one-year statute of limitations also expired as to both Section
20 11 and Section 12 claims before suit was filed. Given this Court's rulings in *Maine*
21 *State, Stichting, and Allstate* as to the date by when reasonably diligent MBS
22 investors would have discovered the facts that they contend support their claims,
23 National Integrity discovered or reasonably should have discovered the allegedly
24 untrue statements prior to November 9, 2010—*i.e.*, more than one year before its
25 Complaint was filed. *See Maine State I*, 722 F. Supp. 2d at 1165; *Stichting*, 2011
26 WL 3558173, at *8; *Allstate*, 2011 WL 5067128, at *10.

27 Like the other Western & Southern companies, National Integrity argues that
28 *American Pipe* tolling saves its 1933 Act claims due to the filing of the *Luther* and

1 *Washington State* class actions. *NI* Compl. ¶¶ 389-95.⁵¹ This argument fails for the
2 very same reasons it fails in *Western & Southern*. The only MBS eligible for
3 *American Pipe* tolling are those as to which “the named plaintiffs in the prior
4 putative class actions had standing to sue, *i.e.*, those tranches that the *Luther* named
5 plaintiffs had actually purchased.” *Allstate*, 2011 WL 5067128, at *10; *accord*
6 *Maine State II*, 2011 WL 4389689, at *2-8; *Stichting*, 2011 WL 3558173, at *2; *see also*
7 *NI* Compl. ¶¶ 397-98 (acknowledging *Maine State I* and *Maine State II*
8 standing rulings). Here, no named *Luther* plaintiff purchased 25 of the 26 MBS
9 purchased by National Integrity, *see NI* Compl. Ex. A; RJN Ex. 102, and its claims
10 based on those 25 securities thus must be dismissed. *Allstate*, 2011 WL 5067128, at
11 *10 (citing *Stichting*, 2011 WL 3558173, at *2).

12 As to the one remaining MBS, CWALT 2005-26CB, National Integrity’s
13 Section 11 claims are barred by the three-year statute of repose. CWALT 2005-
14 26CB was offered to the public on May 21, 2005, the effective date of the relevant
15 shelf registration statement. *See App. 11*. Accordingly, the repose period expired
16 on May 21, 2008, prior to the September 9, 2008 filing of the first *Luther* complaint
17 that included a named plaintiff that purchased the relevant tranche of CWALT 2005-
18 26CB. In other words, the repose period had already expired before any *American*
19 *Pipe* tolling could have been triggered. *See RJN* Ex. 72; *Stichting*, 2011 WL
20 3558173, at *2 (“Plaintiff may not assert §§ 11 or 12(a)(2) claims . . . for which the
21 three-year statute of repose expired before the *Luther* plaintiff either acquired the
22 security or joined the *Luther* case”).

23 Finally, National Integrity’s claim for “control person” liability under Section
24 15 of the 1933 Act also must be dismissed because its predicate Section 11 and
25 12(a)(2) claims are time-barred. *See, e.g.*, *Allstate*, 2011 WL 5067128, at *13

26 ⁵¹ Like the other Western & Southern companies, National Integrity also argues that
27 its 1933 Act claims are tolled under *Vaccariello*, 763 N.E.2d 160 (Ohio 2002), and
28 ORC § 2305.19. *NI* Compl. ¶ 388. But state law tolling principles do not apply to
federal claims. *Centaur Classic Conv. Arbitrage Fund Ltd. v. Countrywide Fin. Corp.*, No. 10-CV-05699-MRP (MANx), slip op. at 6-7 (C.D. Cal. Jan. 20, 2011).

1 (dismissing Section 15 claims where all possible predicate violations were dismissed
2 as time-barred).

3 **2. National Integrity's 1934 Act Claims Are Untimely.**

4 The two-year statute of limitations applicable to National Integrity's 1934 Act
5 claims also expired before National Integrity filed its complaint on November 9,
6 2011. *See* 28 U.S.C. § 1658(b). Because a "reasonable plaintiff exercising
7 reasonable diligence . . . should have discovered facts sufficient to state every
8 element of its [Section 10(b)] claim at least prior to *February 14, 2009*," two years
9 before the filing of any fraud claims in *Stichting, Stichting*, 2011 WL 3558173, at
10 *11 (emphasis added); *accord Allstate*, 2011 WL 5067128, at *11 (dismissing
11 Section 10(b) claim as time-barred because plaintiffs should have discovered every
12 element to state their claim by December 27, 2008, two years prior to the filing of
13 the *Allstate* complaint), National Integrity by definition should have discovered facts
14 sufficient to state its Section 10(b) claim before *November 9, 2009*—more than two
15 years prior to the filing of its complaint. *Id.* National Integrity's Section 10(b)
16 claim is therefore time-barred.

17 Like the other Western & Southern companies, National Integrity tries to
18 circumvent *Allstate* and *Stichting* by alleging that it "did not know and could not
19 have known of its claims prior to June 2009," making the making the very same
20 allegations that the other Western & Southern companies make in their amended
21 complaint about the development and use of "proprietary" models to perform "loan-
22 level analysis" and "fair value pricing" through June 2009, *see NI Compl. ¶¶ 374-*
23 *78, and the very same allegations about information that supposedly first became*
24 *public in June 2009 in the SEC enforcement action. See NI Compl. ¶ 385. These*
25 *arguments fail for the very same reasons they fail in Western & Southern. See*
26 *supra*, at 30-31.

27 In short, like the plaintiffs in *Stichting, Allstate* and *Western & Southern*,
28 National Integrity reasonably should have discovered the factual basis for its Section

1 10(b) claims long before November 9, 2009, two years prior to the filing of the
2 Complaint. *See Stichting*, 2011 WL 3558173, at *8, 11. National Integrity's
3 Section 10(b) claims are time-barred.⁵²

4 Finally, National Integrity's Section 20(a) claim must be dismissed because
5 its predicate Section 10(b) claims are time-barred and must be dismissed. *Stichting*,
6 2011 WL 3558173, at *11; *Allstate*, 2011 WL 5067128, at *13; NI Compl. ¶ 456
7 (Section 10(b) claims form predicate for Section 20(a) claims).

8 **3. National Integrity's OSA Claims Are Untimely.**

9 As in *Western & Southern*, National Integrity alleges five claims for
10 violations of the Ohio Securities Act ("OSA"). These claims, and the allegations
11 supporting these claims, are identical to those asserted by Western & Southern. *See*
12 W&S AC ¶¶ 399-417; NI Compl. ¶¶ 399-417. National Integrity's OSA claims,
13 therefore, are time-barred under the OSA's two-year statute of limitations (OHIO
14 REV. CODE § 1707.34(B)) for the same reasons that Western & Southern's OSA
15 claims are time-barred. *See supra*, at 32-36. More specifically, applying this
16 Court's previous rulings in *Stichting*, National Integrity should have discovered
17 facts sufficient to state its OSA claims prior to November 9, 2009, and as a result
18 these claims are time-barred and must be dismissed. *Id.* (quoting *Stichting*, 2011
19 WL 3558173, at *11).

20 As in *Western & Southern*, National Integrity also argues that its OSA claims
21 are tolled under *Vaccariello v. Smith & Nephew Richards, Inc.*, 763 N.E.2d 160
22 (Ohio 2002). NI Compl. ¶ 388. For the reasons discussed in detail *supra* at 33-35,
23 *Vaccariello* does not permit cross-jurisdictional tolling based on a case not filed in
24 either Ohio or the federal courts, and thus provides no basis for tolling the OSA

25 _____
26 ⁵² National Integrity's 1934 Act claims as to 11 of the Offerings at issue also should
27 be dismissed because they are barred by the five-year statute of repose governing
28 such claims. *See Stichting*, 2011 WL 3558173, at *6; App.11. The relevant
prospectus supplements and shelf registration statements for each of these 11
Offerings were filed with the SEC before November 9, 2006, more than five years
before this suit was filed. *See id.*; *supra*, at n. 23 (citing *Exxon*, 500 F.3d at 200).

1 claims here. Nor does the extraordinary remedy of equitable tolling based on
2 alleged “fraudulent concealment,” *NI* Compl. ¶ 383-87, apply to National Integrity’s
3 OSA claims. National Integrity’s “fraudulent concealment” allegations are identical
4 to Western & Southern’s, and fail for the same reasons those mirror-image
5 allegations do. *See NI* Compl. ¶¶ 383-87; W&S AC ¶¶ 383-87; *supra*, at 35-36.

6 **4. National Integrity’s Common Law Claims Are Untimely.**

7 As the New York Court of Appeals has held, the primary purpose of New
8 York’s borrowing statute (N.Y. C.P.L.R. § 202 (McKinney 2003)) is to prevent
9 precisely what National Integrity has attempted to do here: “forum shopping by a
10 nonresident seeking to take advantage of a more favorable Statute of Limitations in
11 New York.” *Antone v. Gen. Motors Corp.*, 473 N.E.2d 742, 745 (N.Y. 1984); *see*
12 *also supra*, at 40-45 (describing National Integrity’s forum shopping).⁵³ For this
13 reason, the Court of Appeals has explicitly distinguished the term “resident” as used
14 in the New York borrowing statute from “domiciliary” and held that “the
15 determination of whether a plaintiff is a New York resident . . . turns on whether he
16 has a *significant connection* with some locality in the State.” *Id.* at 746 (emphasis
17 added); *Eaton v. Keyser*, 53 A.D.3d 1029, 1030 (N.Y. App. Div. 2008). With
18 respect to corporations, New York courts have generally held that, for purposes of
19 New York’s borrowing statute, “[a] corporation’s principal place of business, rather
20 than its state of incorporation, determines its residence.” *McMahan & Co. v.*
21 *Donaldson, Lufkin & Jenrette Sec. Corp.*, 727 F. Supp. 833, 834 (S.D.N.Y 1989)
22 (citing *Allegaert v. Warren*, 480 F. Supp. 817, 820 (S.D.N.Y. 1979)). Accordingly,
23 New York courts have held that “a foreign corporation cannot take advantage of the
24 borrowing statute simply because it is qualified to do business in New York and
25 maintains an office in the state.” *Allegaert*, 480 F. Supp. at 820; *accord Am.*

26 ⁵³ *See* N.Y. C.P.L.R. § 202 (McKinney 2003) (“An action based upon a cause of
27 action accruing without the state cannot be commenced after the expiration of the time
28 limited by the laws of either the state or the place without the state where the cause of
action accrued, except that where the cause of action accrued in favor of a resident of
the state the time limited by the laws of the state shall apply.”).

1 *Lumbermens Mut. Cas. Co. of Ill. v. Cochrane*, 129 N.Y.S.2d 489, 490-91 (Sup. Ct.
2 1954) (holding plaintiff should not be afforded benefits of residency for purposes of
3 New York borrowing statute where it was “qualified to business in the State of New
4 York, and maintain[ed] an office in the City of New York”).

5 Here, National Integrity’s own allegations confirm that its principal place of
6 business is not in New York, but rather in Ohio. In its new complaint filed in the
7 Southern District of New York, National Integrity *does not* allege that its principal
8 place of business is in New York. Rather, National Integrity alleges that its “senior
9 management is based in Cincinnati, Ohio,” and that it maintains “its principal
10 underwriting and insurance operations in Goshen, New York.” *NI Compl.* ¶¶ 15-16
11 (emphasis added).⁵⁴ Moreover, National Integrity also alleges that its “investment
12 decisions, including the decision to purchase [the] Certificates, are made by
13 National Integrity officials or its affiliates in Cincinnati, Ohio” and that its
14 “investments are managed by portfolio managers located in Cincinnati, Ohio.” *Id.*
15 ¶¶ 17-18.

16 National Integrity’s own allegations, therefore, make clear that its “principal
17 place of business” is not New York, but rather Cincinnati, Ohio, and National
18 Integrity does not contend otherwise in its opportunistic complaint recently filed in
19 Manhattan. According to National Integrity itself in that complaint, Ohio is where
20 both its “senior management” and the portfolio managers that made the decision to
21 purchase the MBS at issue are located. *NI Compl.* ¶¶ 16-18. Accordingly, National
22 Integrity may not use the New York borrowing statute to apply a longer New York
23 statute of limitations to its common law fraud, negligent misrepresentation, and civil
24 conspiracy claims. For precisely this reason, the district court in *McMahan*, 727 F.

25 _____
26 ⁵⁴ In the original *Western & Southern* action filed in the Southern District of Ohio,
27 National Integrity inconsistently represented that it maintained “its principal place of
business in Goshen, New York.” *W&S Compl.* ¶ 23. National Integrity apparently
decided in its subsequent Southern District complaint to articulate more accurately
28 the nature of the operations it actually has in New York as contrasted with where
management decisions are made.

1 Supp. at 834, held that the plaintiff—a partnership formed in New York state—
2 could not use the New York borrowing statute to trigger application of the New
3 York statute of limitations because its principal place of business was in Connecticut
4 and was a Connecticut resident for purposes of the borrowing statute.

5 Because National Integrity is not a resident of New York for purposes of the
6 New York borrowing statute, New York’s borrowing statute requires that the Court
7 next determine *where* the cause of action accrued. *See Global Fin. Corp. v. Triarc*
8 *Corp.*, 93 N.Y.2d 525, 528 (1999). “When a nonresident sues on a cause of action
9 accruing outside of New York, CPLR 202 requires the cause of action to be timely
10 under the limitations periods of both New York and the jurisdiction where the cause
11 of action accrued.” *Id.*; *accord Cantor Fitzgerald Inc. v. Lutnick*, 313 F. 3d 704,
12 710 (2d Cir. 2002) (“a case filed by a non-resident plaintiff requires application of
13 the shorter statute of limitations period . . . provided either by New York or the state
14 where the cause of action accrued”). As this Court has recognized, for purposes of
15 the New York borrowing statute, “a cause of action accrues where the [alleged]
16 injury is sustained,” and “the place of injury . . . is where the economic impact of the
17 defendant’s conduct is felt, which is usually the plaintiff’s place of residence.”
18 *Allstate*, 2011 WL 5067128, at *8 (quoting *Gordon & Co. v. Ross*, 63 F. Supp. 2d
19 405, 408 (S.D.N.Y. 1999)).

20 Here, National Integrity’s allegations demonstrate that the place of injury for
21 its primary-liability claims is Cincinnati, Ohio. National Integrity alleges that its
22 injury is as follows: “The false and misleading statements of material facts and the
23 omissions of material facts in the Offering Materials directly caused National
24 Integrity damage, because the Certificates were far riskier than Defendants
25 described, and for that reason, far less valuable than the prices paid by National
26 Integrity.” NI Compl. ¶ 286. Because the “investment decisions, including the
27 decision to purchase [the] Certificates [were] made by National Integrity officials . .
28 . in Cincinnati, Ohio” (*id.* ¶ 18), and these securities allegedly are “managed by

1 portfolio managers located in Cincinnati, Ohio” (*id.* ¶ 17), it necessarily follows that
2 the place of injury is Cincinnati, Ohio. Accordingly, Ohio’s two-year statute of
3 limitations applies to National Integrity’s common law fraud, negligent
4 misrepresentation and civil conspiracy claims. *See supra*, at 36-37. National
5 Integrity’s common law claims are thus time-barred for the very same reasons that
6 Western & Southern’s identical common law claims are time-barred. *See supra*, at
7 38-39.

8 **VI. ALL CLAIMS IN BANKERS ARE TIME-BARRED.**

9 **A. Under Florida Law, The Statute Of Limitations Of The State With
10 The Most “Significant Relationship” To The Action Applies.**

11 Florida’s borrowing statute (which is to be considered due to the *Bankers*
12 action having originally been filed in federal court in Florida) provides:

13 When a cause of action arose in another state or territory of the United States,
14 or in a foreign country, and its laws forbid the maintenance of the action
15 because of lapse of time, no action shall be maintained in this state.

16 FLA. STAT. § 95.10 (2011). In other words, “[i]f the cause of action arose in another
17 state and the action is time-barred because of that state’s limitation statutes, the
18 borrowing statute precludes the maintenance of the action in Florida.” *Bates v.*
19 *Cook, Inc.*, 509 So. 2d 1112, 1113 (Fla. 1987).

20 To determine where a cause of action “arose” for purposes of Florida’s
21 borrowing statute, courts apply the Restatement’s “significant relationship” test.
22 *Bates*, 509 So. 2d at 1114-15 (“[J]ust as in the case of other issues of substantive
23 law, the significant relationships test should be used to decide conflicts of law
24 questions concerning the statute of limitations,” and in particular, “to decide in
25 which state the cause of action ‘arose.’”).⁵⁵ In fraud and misrepresentation actions,
26 courts applying Florida law look to both Restatement Section 145 (which outlines

27

⁵⁵ *Accord Digoia v. H. Koch & Sons, Div. of Wickes Mfg. Co.*, 944 F.2d 809, 812
28 (11th Cir. 1991) (explaining that significant relationship test in § 145 governs
determination of where claim arose for purposes of Florida borrowing statute).

1 the contacts to be considered in tort actions generally) and Section 148 (which
2 outlines the contacts to be considered in fraud and misrepresentation cases in
3 particular) to determine which state has the most “significant relationship” with the
4 action. *See Topp, Inc. v. Uniden Am. Corp.*, 483 F. Supp. 2d 1187, 1191 (S.D. Fla.
5 2007) (considering Sections 145 and 148 “together” because “the contacts set out in
6 each [section] overlap substantially”). Under Section 145 of the Restatement, the
7 following contacts guide the determination of which state “has the most significant
8 relationship to the occurrence and the parties under the principles stated in § 6”⁵⁶:

- 9 (a) the place where the injury occurred;
- 10 (b) the place where the conduct causing the injury occurred;
- 11 (c) the domicil[e], residence, nationality, place of incorporation and place of
12 business of the parties; and
- 13 (d) the place where the relationship, if any, between the parties is centered.

14 Restatement (Second) of Conflict of Laws § 145(2) (1971). Under Section 148 of
15 the Restatement, courts consider the following contacts to determine the state with
16 the most “significant relationship” to the action:

- 17 (a) the place, or places, where the plaintiff acted in reliance upon the
18 defendant's representations;
- 19 (b) the place where the plaintiff received the representations;
- 20 (c) the place where the defendant made the representations;
- 21 (d) the domicil[e], residence, nationality, place of incorporation and place of
22 business of the parties;
- 23 (e) the place where a tangible thing which is the subject of the transaction

24 _____
25 ⁵⁶ The following considerations outlined in Section 6 of the Restatement guide the
26 “significant relationship” analysis: (a) the needs of the interstate and international
27 systems; (b) the relevant policies of the forum; (c) the relevant policies of other
28 interested states and the relative interests of those states in the determination of the
particular issue; (d) the protection of justified expectations; (e) the basic policies
underlying the particular field of law; (f) certainty, predictability and uniformity of
result; and (g) ease in the determination and application of the law to be applied.
Restatement (Second) of Conflict of Laws § 6(2) (1971).

1 between the parties was situated at the time; and
2 (f) the place where the plaintiff is to render performance under a contract
3 which he has been induced to enter by the false representations of the
4 defendant.

5 Restatement (Second) of Conflict of Laws § 148(2) (1971).⁵⁷

6 Courts applying Florida law do not simply add up the Restatement factors and
7 apply “the law of the sovereign with the greatest numerical total.” *Judge v. Am.*
8 *Motors Corp.*, 908 F.2d 1565, 1569 (11th Cir. 1990). Rather, the factors are a tool
9 “to determine which sovereign has the most significant contact” based on the facts
10 and circumstances presented in each individual case. *Id.* Furthermore, although
11 Florida courts have announced several principles applicable to the choice of law
12 analysis,⁵⁸ Florida courts regard the Restatement factors as “rather malleable,”
13 *Mezroub v. Capella*, 702 So. 2d 562, 565 (Fla. Dist. Ct. App. 1997), and have
14 eschewed “hard-and-fast rules” to guide the significant relationship test, because
15 such questions “cannot be resolved by reciting general pronouncements,” *Digioia*,
16 944 F.2d at 812-13.

17

18

19 ⁵⁷ This assumes that the alleged misrepresentations and the *Bankers* plaintiffs’
20 actions in reliance did not take place wholly in one state (*i.e.*, not all in California).
21 If the alleged misrepresentations and the plaintiff’s actions in reliance did take place
22 in one state, the law of that state will generally apply. *See* Restatement (Second) of
23 Conflict of Laws § 148(1) (1971). Here, the complaint is silent as to the location of
24 the *Bankers* plaintiffs’ actions in reliance on the alleged misrepresentations.

25 ⁵⁸ In tort cases, Florida courts generally presume “that the law of place of injury will
26 apply,” unless “another state has a more ‘significant relationship.’” *McNeil v. CSX*
27 *Transp., Inc.*, 832 So.2d 227, 229 (Fla. Dist. Ct. App. 2002). But in
28 misrepresentation cases, the place of injury is decidedly “less significant.” *Trumpet*
29 *Vine Invs., N.V. v. Union Capital Partners I, Inc.*, 92 F.3d 1110, 1116 (11th Cir.
30 1996) (quoting Restatement (Second) Conflict of Laws § 145 cmt. f). Indeed, the
31 place of injury “takes a backseat to other contacts” in cases involving alleged
32 misrepresentations. *Topp*, 483 F. Supp. 2d at 1192. In addition, although the state
33 in which a plaintiff claims to have relied on the alleged misrepresentations is often a
34 focal point of the “significant relationship” analysis, where—as here—acts in
35 reliance may have occurred in two or more states as opposed to a single state the
36 location of such acts becomes less important. *See* Restatement (Second) of Conflict
37 of Laws § 148, cmt. f (1971).

1 **B. California's Statutes Of Limitations Apply Here.**

2 Here, California has the most significant relationship to the alleged primary-
3 liability occurrences and the parties in this action, by virtue of being the “place
4 where the defendant[s] made the representations.” Restatement (Second) of
5 Conflict of Laws § 148(2)(c). The gravamen of the *Bankers* complaint is that
6 Countrywide allegedly misstated the riskiness and credit quality of the mortgage
7 loans backing the MBS certificates that the *Bankers* plaintiffs bought through the
8 registration statements, prospectuses and prospectus supplements, term sheets and
9 other written materials issued in connection with the sale and offering of those
10 securities. Indeed, the vast majority of the Complaint—spanning almost fifty
11 pages—details the supposed actions and statements of Countrywide entities and
12 personnel. *See, e.g., Bankers Compl.* ¶¶ 35-151, 161-86. And virtually all of these
13 alleged actions (if true) would have occurred in Calabasas, California, where the
14 relevant offering materials were negotiated, approved, and issued.⁵⁹ *See Putnam*
15 *Bank v. Countrywide Fin. Corp.*, No. 3:11-cv-00145, slip op. at 9-10 (D. Conn. May
16, 2011) (transferring case to Central District of California, and noting that “[t]he
17 documents were approved in and issued out of Countrywide’s offices in Calabasas,
18 California”); *In re Countrywide Fin. Corp. Mortgage-Backed Sec. Litig.*, 2011 WL

19 ⁵⁹ Countrywide’s so-called “deceptive scheme,” whereby the company allegedly
20 disregarded its underwriting guidelines “in order to maximize its profits from the
21 sale of . . . loans to the secondary market,” *Bankers Compl.* ¶ 10, allegedly traces to
22 decisions and misrepresentations made by Countrywide personnel that worked out
23 of Countrywide’s California offices. *See id.* ¶ 86 (“[I]nternal documents and its
24 employees’ admissions provide evidence that, *under management’s direction*,
25 approval of ‘exceptions’ was the rule.”); *see id.* ¶ 96 (“Countrywide executives knew
26 that risky loans that were routed out of the normal underwriting process (because
27 they violated underwriting standards) were regularly being approved, even when
28 they had been previously declined.”); *see id.* ¶ 64 (“Under the direction of
[Countrywide executives], Countrywide adopted a new corporate culture of writing
as many mortgage loans as possible . . . regardless of the creditworthiness or evident
fraud of the borrower.”) (emphases added). As the United States District Court for
the District of Connecticut noted in transferring the *Putnam* case to this Court,
“[a]llegations of systemic wrongdoing by a corporate defendant clearly call into
issue the conduct of corporate policy makers, who were located at corporate
headquarters within the Central District of California.” *Putnam Bank v.*
Countrywide Fin. Corp., No. 3:11-cv-00145, slip op. at 10 (D. Conn. May 16,
2011).

1 3569969, at *4 (J.P.M.L. Aug. 15, 2011) (selecting the Central District of California
2 as the appropriate forum for the Countrywide MBS multidistrict litigation
3 proceeding, in part because “Countrywide parties, witnesses, and documents are
4 located primarily” in the Central District); *Allstate Ins. Co. v. Countrywide Fin.*
5 *Corp.*, 2011 WL 2360274, at *2 (S.D.N.Y. June 14, 2011) (transferring case to
6 Central District of California after considering, among other factors, the “locus of
7 operative facts”).

8 The *Bankers* plaintiffs⁶⁰ may argue that they received and relied on the
9 alleged misrepresentations in Florida (Restatement § 148(2)(a)), and that Florida’s
10 limitations period ought to apply. But any such argument should not be accorded
11 significant weight because the Complaint contains no allegations regarding where
12 any supposed acts of reliance may have occurred. Particularly because there may be
13 any number of intermediaries involved in the purchases at issue (e.g., portfolio
14 managers, investment advisers, and/or brokers) and any number of alleged acts in
15 reliance taking place in different locations, it cannot be assumed that any alleged
16 reliance occurred in Florida, or that any contact with Florida should predominate,
17 simply because three of the *Bankers* plaintiffs allegedly have their places of business
18 there. *See, e.g., Greenberg Traurig of New York, P.C. v. Moody*, 161 S.W.3d 56, 72
19 n.12, 75-76 (Tex. App. 2004) (“no state emerges as the sole place of reliance” by
20 plaintiff located in Texas where some acts in reliance occurred in Pennsylvania,
21 including investors’ decision to invest while visiting facility in Pennsylvania, while
22 other acts, such as sending checks and wiring money from Texas for stock
23 purchases, occurred in Texas; holding instead that New York, as place from where
24 alleged misrepresentations emanated, controlled); *Topp*, 483 F. Supp. 2d at 1191

25
26 ⁶⁰ BIC, BLIC, and FCIC allegedly purchased all but one of the certificates at issue.
27 *Bankers* Compl. ¶¶ 6, 18-20. The Complaint does not disclose the identity of the
28 remaining purchaser, merely identifying it as “BBSC,” an acronym which is not
defined or referenced elsewhere in the Complaint. *Id.* ¶ 6. “BSIC” is defined in the
Complaint as a Louisiana corporation, but it is not alleged to have purchased any of
the certificates. *Id.* ¶¶ 6, 21.

1 (finding that no particular state could be identified as place where
2 misrepresentations were made or received and accordingly placing less weight on
3 these factors where plaintiff did not allege that misrepresentations took place at a
4 specific physical meeting).⁶¹

5 Furthermore, even if some acts of reliance allegedly did occur in Florida, the
6 allegations in the Complaint as a whole relate only minimally to the actions of the
7 *Bankers* plaintiffs. Indeed, according to the Complaint, the alleged abandonment of
8 underwriting guidelines was not limited to the specific securitizations purchased by
9 the *Bankers* plaintiffs but affected all of the MBS that Countrywide's subsidiaries
10 issued; nor is there any allegation that the alleged misrepresentations at issue were
11 directed to the *Bankers* plaintiffs or to Florida in particular. Rather, the *Bankers*
12 plaintiffs allege *systemic* conduct by Countrywide occurring almost exclusively in
13 California, resulting in representations that were widely disseminated to investors
14 throughout the country. In circumstances like this, courts in Florida and elsewhere
15 have held that the state in which the allegedly fraudulent conduct occurred has a
16 more significant relationship to the action than the state where the plaintiff allegedly
17 received and relied on the representations.⁶² Thus, in light of the significant contacts

18 ⁶¹ See Restatement § 148, cmt. f (noting that a plaintiff's reliance may take many
19 forms, and "provides a more important contact when it is confined to a single state
that when it is divided among two or more").

20 ⁶² See *Dart Indus., Inc. v. Acor*, 2008 WL 4816612, at *13 n.14 (M.D. Fla. Nov. 5,
2008) (under Restatement § 148, Tennessee law applied even though plaintiff, with
a principal place of business in Florida, received the misrepresentations and acted
upon them in Florida); *First Nat'l Bank of Boston v. Heuer*, 702 F. Supp. 173, 175-
21 76 (N.D. Ill. 1988) (under Restatement § 148, Illinois law applied "[b]ecause the
22 alleged misrepresentations were made in Illinois," despite plaintiff's principal place
of business in Massachusetts); *Greenberg Traurig of N.Y.*, 161 S.W.3d at 72-76
23 (applying New York law because defendant's misrepresentations emanated from
New York, where defendant law firm had offices and performed services; holding
24 that "when evaluating fraud-based claims to determine governing law, the principal
focus is where the conduct occurred," and that New York has "substantial interest in
regulating fraudulent conduct occurring in New York"). Indeed, in granting the
25 motion to transfer the *Putnam* case from the District of Connecticut to this Court,
the district court held that "the central events addressed in th[e] action occurred
26 within the Central District of California" because the documents were approved in
and issued out of Countrywide's offices in Calabasas, California" and because the
27 alleged conduct took place at corporate headquarters within the judicial district.
Putnam Bank, slip op. at 9-10. The court further noted that "[t]he single, individual

1 that the parties and the alleged occurrences have with California, the *Bankers*
2 plaintiffs' causes of action arose in California and are governed by California's
3 statutes of limitations.⁶³

4 **C. Banker's Claims Are Untimely Under California's**
5 **Statutes Of Limitations.**

6 The *Bankers* plaintiffs' claims are time-barred by California's applicable
7 statutes of limitations for (i) fraud, which is three years from "discovery, by the
8 aggrieved party, of the facts constituting the fraud or mistake," CAL. CIV. PROC.
9 CODE § 338(d) (2006); and (ii) negligent misrepresentation, which is subject to a
10 two-year statute of limitations. *See Platt Elec. Supply, Inc. v. EOFP Elec., Inc.*, 522
11 F.3d 1049, 1054 (9th Cir. 2008). As detailed above and in the Court's prior rulings,
12 these limitations periods are subject to a "lenient inquiry notice standard," and begin
13 to run "when the plaintiff suspected or should have suspected that an injury was
14 caused by wrongdoing." *Stichting*, 2011 WL 3558173, at *12; *accord Allstate*, 2011
15 WL 5067128, at *13.

16
17 state with the strongest interest in this action would appear to be California, the state
18 where the primary defendants were located and where the allegedly unlawful
19 activities occurred. California presumably has a strong interest in allegations of
illegal activity on the part of one of its largest financial institutions. *Id.*

20 ⁶³ The remaining factors are neutral, inapplicable, or favor California. With respect
21 to the location and state of incorporation of the parties, one of the four *Bankers*
22 plaintiffs is incorporated and allegedly has its principal place of business in
Louisiana, the remainder in Florida; the Countrywide Defendants are primarily
23 located in California, though some are incorporated elsewhere, but none is
incorporated in or has a principal place of business in Florida. Thus, the "domicile,
24 residence, . . . and place of business of the parties" does not favor Florida or
California (or any other state). *See Restatement* § 145(2)(c); *id.* § 148(2)(d). The
25 place of required performance and the location of the "tangible thing" at issue are
both inapplicable. *Id.* § 148(2)(e)-(f). The central location of the plaintiffs'
26 relationship with the Countrywide Defendants was, if anywhere, California. *See* §
145(2)(d). As the location of Countrywide's headquarters, California was the
27 origination point of the MBS offerings at issue, which were made available to
investors across the country and had no particular focus on investors in Florida.
Finally, with respect to § 145(2)(a), even assuming the *Bankers* plaintiffs sustained
28 their alleged injuries in Florida (and the Complaint contains no such allegation), the
place of injury "takes a backseat to other contacts in fraud cases," *Topp*, 483 F.
Supp. 2d at 1192, and is "less significant" than the place where the misconduct
originated. *Trumpet Vine*, 92 F.3d at 1115-16.

1 In *Stichting*, this Court dismissed the plaintiff's common law fraud and
2 negligent misrepresentation claims as time-barred because, in light of widespread
3 press coverage and prior lawsuits filed against Countrywide, a reasonable person
4 would have been alerted to "wrongdoing in Countrywide's loan origination
5 business" in late 2007 or at least by January 2008—and therefore before February
6 14, 2008 (*i.e.*, more than three years before the relevant complaint in February
7 2011). *Id.* As detailed in App. 5, the allegations in the *Bankers* complaint are
8 identical to those in *Stichting*. Yet *Bankers* was not filed until July 22, 2011—more
9 than five months *after* the *Stichting* complaint that the Court has already held to be
10 time-barred. Thus, for the same reasons set forth in *Stichting*, the *Bankers* plaintiffs
11 were on inquiry notice of their claims more than three years before their complaint
12 was filed, and their claims are time-barred under California law.

13 **VII. ALL CLAIMS IN STERLING ARE TIME-BARRED.**

14 The *Sterling* case was transferred from the Northern District of Illinois, and
15 that forum's choice of law rules must be applied. *See supra* at 23. In procedural
16 matters, including which statute of limitations governs, Illinois applies the law of the
17 forum state. *Newell Co. v. Petersen*, 758 N.E.2d 903, 908 (Ill. App. Ct. 2001).
18 Under Illinois law, "an action cannot be maintained in the forum state if it is barred
19 either by the statute of limitations of the forum state or by a statute of limitations
20 that the forum state has 'borrowed' from another jurisdiction in accordance with the
21 forum state's 'borrowing statute.'" *Id.* (citing Restatement (Second) of Conflicts of
22 Law § 142 (1971)); *see also Employers Ins. of Wausau v. Ehlco Liquidating Trust*,
23 723 N.E.2d 687, 692-93 (Ill. App. Ct. 1999) (same). Here, *Sterling*'s primary-
24 liability claims are barred both by (i) Illinois' statute of limitations and (ii)
25 California's statute of limitations, as borrowed in accordance with Illinois'
26 borrowing statute.

27 A. **Illinois' Statute of Limitations Bars Sterling's Claims.**

28 In Illinois, fraud and negligent misrepresentation claims arising out of the

1 purchase of securities are subject to the statute of limitations applicable to claims
2 under the Illinois Securities Law, 815 ILL. COMP. STAT. 5/13(D). *Tregenza v.*
3 *Lehman Bros., Inc.*, 687 N.E.2d 14, 15 (Ill. App. Ct. 1997). In *Allstate*, this Court
4 held that allegations paralleling those made here (*see* App. 6)—namely, that
5 “Countrywide misrepresented the quality of the loans underlying its RMBS”—
6 concerned conduct “squarely governed by the ISL” and that the ISL, therefore,
7 provides the applicable statute of limitations for common law claims based on such
8 allegations. 2011 WL 5067128, at *9. Here, as in *Allstate*, the ISL’s limitations
9 period is applicable to Sterling’s claims.

10 The Illinois Securities Law states that “[n]o action shall be brought for relief
11 under this Section or upon or because of any of the matters for which relief is
12 granted by this Section after 3 years from the date of sale.” 815 ILL. COMP. STAT.
13 5/13(D) (2010). The statute further provides:

14 [I]f the party bringing the action neither knew nor in the exercise of
15 reasonable diligence should have known of any alleged violation . . . which is
16 the basis for the action, the 3 year period provided herein shall begin to run
17 upon the earlier of:

- 18 (1) the date upon which the party bringing the action has actual
19 knowledge of the alleged violation of this Act; or
- 20 (2) the date upon which the party bringing the action has notice of facts
21 which in the exercise of reasonable diligence would lead to actual
22 knowledge of the alleged violation of this Act; but in no event shall
23 the period of limitation so extended be more than 2 years beyond the
24 expiration of the 3 year period otherwise applicable.

25 *Id.* In other words, the three-year limitations period set out in the statute may be
26 lengthened by equitable tolling up to an additional two years, but in no event may a
27 claim be asserted more than five years after the date of sale (the repose period). *See*
28 *Allstate*, 2011 WL 5067128, at *8-9.

1 Accordingly, Sterling’s claims with respect to three of its four purchases are
2 time-barred by the statute’s five-year period of repose.⁶⁴ More specifically, Sterling
3 filed its complaint on March 23, 2011, and alleges that it made three of its four MBS
4 purchases before March 23, 2006 (two were made in 2004 and one in 2005).
5 *Sterling Compl.* ¶ 6. Because those purchases were made more than five years
6 before the Complaint was filed, the common law claims associated with those
7 purchases are time-barred by the repose period and must be dismissed with
8 prejudice. *See Allstate*, 2011 WL 5067128, at *13.

9 Sterling’s claims based on its one remaining purchase—made on November
10 6, 2006 and thus within the five-year repose period—are nevertheless barred by the
11 ISL’s three-year statute of limitations. Sterling bears the burden of pleading facts
12 sufficient to invoke the equitable tolling exception in the statute—in other words,
13 sufficient to lengthen the period within which a claim may be brought beyond three
14 years from the date of sale. *See Rein v. David A. Noyes & Co.*, 595 N.E.2d 565, 568
15 (Ill. App. Ct. 1992) (equitable tolling provision of 815 ILL. COMP. STAT. 5/13(D)
16 may extend the three-year limitations period by up to two years, “provided that
17 plaintiffs properly allege and demonstrate the requisite grounds”); *Basil v.*
18 *Leidesdorf*, 713 F. Supp. 1194, 1201 (N.D.Ill. 1989) (Illinois tolling principles
19 require a plaintiff to plead both due diligence and fraudulent concealment). Here,
20 Sterling has alleged no facts whatsoever regarding when it discovered the alleged
21 violations, any efforts undertaken to discover the alleged violations, or why the
22 exercise of reasonable diligence would not have led to discovery of the violation
23 within three years of its purchases. Nor does Sterling allege anything remotely
24 resembling fraudulent concealment by any of the Defendants.⁶⁵ Given Sterling’s

25 _____
26 ⁶⁴ Because Sterling has not borne its burden of pleading facts sufficient to invoke the
27 equitable tolling exception in Section 13(D) of the ISL, its claims based on these
infra at 61-62.
28 ⁶⁵ The Complaint does not mention 815 ILL. COMP. STAT. 5/13(D) at all, let alone
attempt to invoke the equitable tolling provisions of the statute.

1 failure to plead any facts sufficient to invoke the statute's equitable tolling
2 provision, Sterling's claims based on its November 2006 purchase are time-barred
3 by the plain language of 815 ILL. COMP. STAT. 5/13(D) because it did not file its
4 action until more than three years later (March 23, 2011).⁶⁶

5 **B. California's Statute Of Limitations, Applied Via Illinois'**
6 **Borrowing Statute, Bars Sterling's Claims.**

7 Regardless of whether Sterling's primary-liability claims are barred by
8 Illinois' limitations period, its claims are barred as a result of application of Illinois'
9 borrowing statute.⁶⁷ Illinois' borrowing statute provides:

10
11 ⁶⁶ Even if Sterling had invoked the statute's equitable tolling provisions, its claims
12 based on the November 6, 2006 purchase nevertheless would be barred under the
13 statute's inquiry notice standard. Sterling reasonably should have discovered the
14 facts underlying its claims no later than January 2008—more than three years before
15 the filing of this Complaint. *See Stichting*, 2011 WL 3558173, at *8. In this regard,
16 the Countrywide Defendants acknowledge, but respectfully disagree with, this
17 Court's interpretation in *Allstate* of 815 ILL. COMP. STAT. 5/13(D) as requiring a
18 plaintiff to have had actual knowledge of facts that should have triggered an
19 investigation that in turn would have unearthed actual knowledge of a violation. *See*
20 *Allstate*, 2011 WL 5067128, at *14. The Countrywide Defendants respectfully
submit that the standard applicable to the Illinois Securities Law's limitation
provision is "inquiry notice" such that "[t]he statute of limitations begins to run
when [plaintiff] has notice of suspicious activity so that a reasonable person would
investigate, even if he was not aware of the full extent of the injury." *Grumhaus v.*
Comerica Secs. Inc., 2003 WL 21504185, at *2-3 (N.D. Ill. June 30, 2003); *accord*
Lucas v. Downtown Greenville Investors Ltd. P'ship, 671 N.E.2d 389, 396 (Ill. App.
Ct. 1996) (plaintiffs who received memoranda containing terms contrary to their
understanding of agreement were on notice of a "potential ambiguity" and, had they
exercised reasonable diligence, would have learned of misrepresentation).

21 ⁶⁷ Because Sterling's claims are barred under the applicable Illinois statute of
22 limitations, the Court need not apply any other jurisdiction's limitations law that
23 otherwise would be borrowed under Illinois' borrowing statute. *See Kalmich v.*
Bruno, 404 F. Supp. 57, 68 (N.D. Ill. 1975), *rev'd on other grounds*, 553 F.2d 549
(7th Cir. 1977) (where Illinois statute of limitations bars the claim, the borrowing
statute is inapplicable); *Newell*, 758 N.E.2d at 908 ("[A]n action cannot be
maintained in the forum state if it is barred by *either* the statute of limitations of the
forum state *or* by a statute of limitations that the forum state has 'borrowed' from
another jurisdiction in accordance with the forum state's 'borrowing statute'"')
(emphasis added); Restatement (Second) of Conflict of Laws § 142 (1971), cmt. f
("Borrowing statutes are usually held to provide that a suit will be barred if it would
be barred either under the statute of limitations of the state referred to by the
forum's borrowing statute or under the local statute of limitations of the forum.").
Nevertheless, Sterling's claims are analyzed herein under Illinois' borrowing statute
in the event that this Court determines that claims based on any of Sterling's four
purchases are not barred by Illinois' own statute of limitations.

1 When a cause of action has arisen in a state or territory out of this State, or in
2 a foreign country, and, by the laws thereof, an action thereon cannot be
3 maintained by reasons of the lapse of time, an action thereon shall not be
4 maintained in this State.

5 735 ILL. COMP. STAT. 5/13-210 (2010). Pursuant to the borrowing statute, Sterling’s
6 claims arose in California and are thus barred by the applicable three-year statute of
7 limitations.

8 **1. California’s Statute of Limitations Applies.**

9 The requirements for application of Illinois’ borrowing statute are satisfied:
10 (i) no party resides in Illinois and (ii) the cause of action arose outside of Illinois—
11 namely, in California for the primary-liability claims. *See LeBlanc v. G.D. Searle &*
12 *Co.*, 533 N.E.2d 41, 42 (Ill. App. Ct. 1988) (setting out requirements for application
13 of borrowing statute).

14 **a. No Party Resides In Illinois.**

15 Here, no party resides in Illinois. “For purposes of the Illinois borrowing
16 statute, a corporation is considered a resident only of the state in which it is
17 incorporated; it is not considered a resident of the state in which it has its principal
18 place of business or the state where it is licensed to do business.” *Employers Ins. of*
19 *Wausau*, 723 N.E.2d at 693; *accord LeBlanc*, 533 N.E.2d at 42-43 (Illinois courts
20 have expressly rejected the approach of some other states that a corporation’s
21 principal place of business can suffice to establish residency). Sterling is “a federal
22 savings bank chartered under the laws of the United States,” *Sterling Compl.* ¶ 19,
23 and is thus not incorporated in Illinois or any other state. *See* 12 U.S.C. §
24 1464(a)(1) (2006). As such, Sterling is not a resident of Illinois for purposes of the
25 borrowing statute. Nor are any of the Countrywide Defendants residents of Illinois.
26 Instead, they are corporations incorporated in Delaware, New York or California—
27 none in Illinois. *See Sterling Compl.* ¶¶ 20-26.⁶⁸ Because none of the parties

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⁶⁸ The remaining defendants are also not residents of Illinois for purposes of the
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1 resides in Illinois, the first requirement for application of the borrowing statute is
2 satisfied.

3 **b. California Has The Most “Significant Relationship”**
4 **To This Action.**

5 When determining where a cause of action arose for purposes of Illinois’
6 borrowing statute, Illinois courts apply the Restatement (Second) of Conflicts of
7 Laws §148 (1971) to determine what state “has the most significant relationship to
8 the occurrence and the parties.” Restatement (Second) of Conflict of Laws § 145
9 (1971); *Atchinson, Topeka & Santa Fe Ry. Co. v. Chevron U.S.A., Inc.*, 1985 WL
10 2265, at *4 (N.D. Ill. Aug. 5, 1985) (“Illinois courts now use the ‘most significant
11 relationship test’ to determine where the cause of action arose.”). The specific
12 factors considered under § 148 are set forth *supra*, at 53. Illinois courts do not
13 resolve choice of law questions under § 148 by merely counting contacts, but
14 instead consider “the interests and public policies of potentially concerned states”
15 and “the manner and extent of such policies as they relate to the transaction.”
16 *Morris B. Chapman & Assocs., Ltd. v. Kitzman*, 716 N.E.2d 829, 837 (Ill. App. Ct.
17 1999); *accord Townsend v. Sears, Roebuck and Co.*, 879 N.E.2d 893, 905 (Ill.
18 2007). Contrary to the presumption applicable in tort cases generally that the place
19 of injury controls, *see Townsend*, 879 N.E.2d at 903, “in cases of fraud or
20 misrepresentation . . . the place of loss is less important than the place the defendant
21 allegedly made the misrepresentations,” *First Nat'l Bank of Boston*, 702 F. Supp. at
22 175.

23 For the same reasons set forth above with respect to the *Bankers* action,
24 California has the most “significant relationship” to the parties and occurrences in
25 borrowing statute. Bank of America Corp., NB Holdings Corp., and The Bank of
26 New York Mellon Corp. are incorporated under the laws of Delaware. *Sterling*
27 Compl. ¶¶ 28, 30-31; Bank of America Corp., Annual Report (Form 10-K), at 1
28 (Feb. 25, 2011), RJN Ex. 117; The Bank of New York Mellon Corp., Annual Report
(Form 10-K), at 4 (Feb. 28, 2011), RJN Ex. 118. BAC Home Loans Servicing, L.P.
(formerly known as Countrywide Home Loans Servicing, L.P.) is alleged to be a
limited partnership organized under the laws of Texas. *Sterling* Compl. ¶ 29.

1 *Sterling's* primary-liability claims by virtue of being "the place where the
2 defendant[s] made the representations" (Restatement § 148(2)(c)).⁶⁹ *See supra*, at
3 55-58. Like the nearly identical *Bankers* claims, the primary thrust of the *Sterling*
4 complaint (which was drafted by the same lawyers) is that Countrywide allegedly
5 misstated the riskiness and credit quality of the mortgage loans backing the MBS
6 certificates in which Sterling invested. In short, because (i) California was the hub
7 of the Countrywide Defendants' MBS activity and the location where the offering
8 materials alleged to be misleading were negotiated, approved, and issued,⁷⁰ (ii) the
9 *Sterling* complaint focuses on the allegedly systemic conduct of Countrywide
10 occurring almost exclusively in California and the complaint's allegations relate
11 only minimally to the actions of Sterling, and (iii) there is no allegation that the
12 misrepresentations at issue were directed to Sterling or to Illinois in particular, the
13 claims arose in California for purposes of Illinois' borrowing statute and
14 California's limitations periods therefore control.

15

16 ⁶⁹ Like the complaint in *Bankers*, the *Sterling* complaint contains no allegations
17 regarding "where the plaintiff received the representations," Restatement §
18 148(2)(b), or "where the plaintiff acted in reliance upon the defendant[s']"
19 representations," Restatement § 148(2)(a). Given that there may be any number of
20 intermediaries involved in the purchases at issue and any number of alleged acts in
21 reliance taking place in difference locations, it cannot be assumed that any reliance
22 occurred in Illinois simply because Sterling has its place of business there, or that
23 this factor ought to predominate in the analysis. In addition, as to § 148(2)(d),
24 although Sterling's principal place of business is in Illinois, its relationship to
Illinois—as a nationally chartered bank—is not as strong as it would be were it also
incorporated in Illinois. *Sterling* Compl. ¶ 19. The Countrywide Defendants have
significant ties to California given that plaintiff concedes their primary places of
business are in California. *Id.* ¶¶ 20-26. Thus, factor (d) is essentially neutral. *See*
Townsend, 879 N.E.2d at 906 ("domicile, residence, place of incorporation, and
place of business of the parties" factor "a wash" where plaintiffs resided in
Michigan and defendant was headquartered in Illinois). Factors (e) and (f) do not
apply to the allegations at issue.

25 ⁷⁰ As in *Bankers*, the "deceptive scheme" alleged by Sterling is based on decisions
and misrepresentations allegedly made by Countrywide personnel that worked out
26 of Countrywide's California offices. *See Sterling* Compl. ¶ 10; *id.* ¶ 83 ("internal
documents and its employees' admissions provide evidence that, *under
management's direction*, approval of 'exceptions' was the rule"); *id.* ¶ 93
27 ("Countrywide executives knew that risky loans that were routed out of the normal
underwriting process (because they violated underwriting standards) were regularly
28 being approved, even when they had been previously declined") (emphases added).

1 **2. California's Statute Of Limitations Bars Sterling's Claims.**

2 Sterling's claims are barred by California's three-year statute of limitations
3 for fraud claims and two-year statute of limitations for negligent misrepresentation
4 claims, applicable through Illinois' borrowing statute. *See supra*, at 58-59. The
5 *Sterling* complaint was filed *after* the filing of the virtually identical *Stichting*
6 complaint that the Court has already found time-barred under California law.
7 Because a reasonable investor in Countrywide MBS would have been alerted to
8 alleged "wrongdoing in Countrywide's loan origination business" no later than
9 February 2008, three years before the filing of *Stichting* and more than three years
10 before the filing of *Sterling*, Sterling's fraud and negligent misrepresentation claims
11 are untimely under California law and must be dismissed with prejudice. *Stichting*,
12 2011 WL 3558173, at *12.

13 **VIII. SEALINK DOES NOT HAVE ARTICLE III STANDING, AND ALL
14 CLAIMS IN SEALINK IN ANY EVENT ARE TIME-BARRED.**

15 Sealink's claims against the Countrywide Defendants are barred for two
16 reasons: (1) Sealink does not have Article III standing to bring such claims; and (2)
17 those claims are barred by the applicable statute of limitations. Sealink alleges that
18 it "is a company incorporated under the laws of Ireland that was established to
19 receive, hold and manage RMBS purchased by [two] special purpose vehicles
20 formerly sponsored by Sachsen LB ('the SPVs')." *Sealink Compl.* ¶ 12. Sachsen
21 LB was one of a number of large, state-owned German "Landesbanks" until it failed
22 in April 2008 and was acquired by Landesbank Baden Wurttemburg ("LBBW").
23 RJN Ex. 114 at 4-5 (2007 Sachsen LB Annual Report). Between 2005 and 2007
24 (from four to six years before Sealink filed its Complaint), while sponsored by
25 Sachsen LB, the two SPVs allegedly purchased 31 MBS (issued in 30 Offerings)
26 that certain Countrywide Defendants either issued or underwrote. *See Sealink*
27 *Compl.* ¶¶ 2, 33. On September 29, 2011, Sealink brought these claims in New
28 York state court alleging four causes of action: common-law fraud, fraudulent

1 inducement, aiding and abetting fraud, and negligent misrepresentation. The claims
2 are based on allegations that the Countrywide Defendants' offering materials
3 misrepresented the characteristics and risks of the MBS.⁷¹ *See id.* ¶¶ 1, 128–167.
4 Sealink does not have standing to bring these claims, and in any event the claims are
5 time-barred under the applicable German statute of limitations, which applies here
6 under New York's borrowing statute. N.Y. C.P.L.R. § 202.

7 **A. Sealink Lacks Standing.**

8 To satisfy standing requirements under Article III of the U.S. Constitution, a
9 plaintiff must show that it has suffered an “injury in fact” that is “fairly traceable to
10 the challenged action of the defendant.” *Friends of the Earth, Inc. v. Laidlaw Envtl.*
11 *Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000). As this Court itself has noted, the
12 absence of injury can be “addressed as a standing inquiry.” *In re Countrywide Fin.*
13 *Corp. Sec. Litig.*, 588 F. Supp. 2d 1132, 1168 (C.D. Cal. 2008); *accord Siemers v.*
14 *Wells Fargo & Co.*, 2006 WL 3041090, at *7 (N.D. Cal. Oct. 24, 2006) (“[w]ithout
15 the requisite demonstration of an injury, none of the named Plaintiffs may seek relief
16 on behalf of himself or any other member of the class.”) (citation omitted). A
17 plaintiff must assert its own legal rights, and not the rights of others, in order to have
18 standing to bring a claim. *See e.g., Warth v. Seldin*, 422 U.S. 490 (1975) (explaining
19 that plaintiff “generally must assert his own *legal rights* and interests, and cannot
20 rest his claim to relief on the *legal rights* or interests of third parties”) (emphasis
21 added); *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977)
22 (“In the ordinary case, a party is denied standing to assert the rights of third
23 persons”) (citation omitted); *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467
24 U.S. 947, 955 (1984) (a plaintiff “cannot rest his claim to relief on the legal rights or
25 interests of third parties”) (citation omitted).

26 ⁷¹ Sealink’s claims are now before this Court following (i) the Countrywide
27 Defendants’ October 6, 2011 removal of the case to the Southern District of New
28 York, and (ii) the JPML’s October 27, 2011 transfer of this case to the *Countrywide*
MBS MDL. Although Sealink moved to remand on November 7, 2011, it withdrew
that motion on November 18, 2011. *See* Dkt. No. 26.

1 Publicly available, judicially-noticeable documents show that Sealink has not
2 suffered any injury in connection with holding the MBS at issue, nor could it, due to
3 guarantees extended to it by several German banks in connection with its purchase
4 of the MBS. Specifically, these documents show the following:

5 • *German bank Sachsen LB financed the SPVs that purchased the MBS.*
6 Sachsen LB initially sponsored the two SPVs (known as Ormond Quay and Saschen
7 Funding I) that purchased the MBS at issue here—*i.e.*, this German bank supplied
8 the assets with which these two SPVs purchased the MBS. *See RJN Ex. 114 at 21*
9 (2007 Sachsen LB Annual Report). In 2007, after the onset of the global financial
10 markets crisis, it “decided to provide support to these [SPVs]” in view of “the
11 withdrawal of investors from the funding of the conduit structures and the resulting
12 drop in the price of positions.” *Id.* at 44. v That support “led to a significant strain
13 on liquidity,” and Sachsen LB was then forced to seek liquidity from other German
14 banks. “It was only through the bank pooling agreement among the Landesbanks
15 and the investment in Sachsen LB by [Landesbank Baden-Wurttemberg (‘LBBW’)]
16 that the funding . . . could be stabilized and secured for the long term.” *Id.*

17 • *When German bank LBBW acquired Sachsen LB, the SPVs’ MBS*
18 *portfolios were transferred to Sealink.* LBBW acquired most of Sachsen LB’s
19 assets in or about December 2007 because Sachsen LB was “heavily impacted by
20 the effects of the subprime crisis.” *Id.* at 10. As a result, Sachsen LB transferred the
21 assets of the SPVs (including the MBS at issue here) into Sealink—“a new special
22 purpose entity financed by LBBW” and by other German Landesbanks. *Id.*
23 According to LBBW’s June 30, 2010 publicly-filed Financial Stability Forum
24 Report, “structured portfolios Ormond Quay and Sachsen Funding I [which
25 purchased the MBS at issue here] were excluded from [LBBW’s] acquisition” of
26 Sachsen LB, and “transferred to the Irish special purpose vehicle, Sealink Funding
27 Ltd., established in 2008.” RJN Ex. 115 at 20 (Financial Stability Forum Report).

28 • *German entities will bear any and all losses arising from the portfolio*

1 assets. Sealink's publicly-filed 2009 financial statements disclose that a group of
2 senior lenders, all German Landesbanks, and a junior lender, LBBW, have agreed to
3 cover any and all losses incurred on the MBS at issue here. Those financial
4 statements state that "the funding provided by the Senior and Junior lenders is
5 limited recourse in nature, . . . with the repayment of loan principal dependent
6 entirely on the returns generated by [Sealink's] portfolio. ***Therefore all losses made***
7 ***by [Sealink] will ultimately be borne by the loan holders.***" RJN Ex. 116 at 7, 9,
8 and 10 (2009 Sealink Abridged Financial Statements) (emphasis added.)

9 • *The German bank LBBW and a German state entity have provided*
10 *Sealink with guarantees against any losses on these MBS.* Sealink is not only
11 structured so that the German Landesbank lenders will incur all losses resulting
12 from diminished cash flows (if any) from the MBS, but LBBW and Germany's Free
13 State of Saxony are guarantors of "all indirect and direct risk in relation to payment
14 defaults on the portfolio assets." *Id.* at 7, 11; *see also* RJN Ex. 115 at 4 (Financial
15 Stability Forum Report).⁷² In other words, because of Sealink's financial structure
16 and the guarantees it has received from LBBW and Saxony, German Landesbanks
17 and the Free State of Saxony will incur any and all losses here. Thus, according to
18 Sealink's own public reports, it has admitted that its lenders and guarantors would
19 incur any economic losses that may be associated with the Countrywide MBS at
20 issue. Because Sealink itself will incur no losses, its claims must be dismissed with
21 prejudice for lack of standing.

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⁷² *See also* RJN Ex. 115 at 20 (Financial Stability Forum Report) ("The Free State
25 of Saxony has issued a first loss guarantee in the amount of EUR 2.75 billion to
cover losses arising from the Sealink portfolio. Losses relating to former Sachsen
26 Funding I assets were covered by LBBW up to an amount of EUR 71.3 million (the
"Special First Loss Guarantee"). Since June 30, 2009, defaults exceeding the
27 guarantee provided by the Free State of Saxony up to an amount of EUR 6 billion
have been covered by the risk shield of the State of Baden-Wurttemberg. All other
28 losses beyond this amount would be assumed predominantly by the other
Landesbanks involved.").

1 **B. In Any Event, Sealink's Claims Are Time-Barred Under**
2 **Germany's Statute Of Limitations Law.**

3 **1. German Law Applies Under New York's Borrowing Statute.**

4 Even if Sealink had standing to pursue its claims, which it does not, its
5 primary-liability claims would be time-barred under German law. Under New
6 York's borrowing statute, a non-New York plaintiff's claim that accrues outside of
7 New York must "be timely under the limitations periods of *both* New York and the
8 jurisdiction where the cause of action accrued." *Global Fin. Corp. v. Triarc Corp.*,
9 93 N.Y.2d 525, 528 (1999) (emphasis added).⁷³ As this Court has held, "[a] cause
10 of action 'accrues where the injury is sustained rather than where the defendant
11 committed the wrongful acts.'" *Allstate*, 2011 WL 5067128, at *8 (quoting *Gordon*
12 & Co. v. Ross, 63 F. Supp. 2d 405, 408 (S.D.N.Y. 1999)). Although a plaintiff often
13 sustains economic injuries at its principal place of business, that "need not
14 necessarily be the situs of the economic impact of the fraud, and the court can
15 properly consider all relevant factors in determining where the loss is felt." *Lang v.*
16 *Paine, Webber, Jackson & Curtis, Inc.*, 582 F. Supp. 1421, 1425-26 (S.D.N.Y.
17 1984) ("[T]he place of injury in this case was Massachusetts, the situs of Lang's
18 American bank account, his brokerage account, and the Paine Webber office
19 through which all trades were placed, and not Ottawa, which is his residence.");
20 *accord Intellivision v. Microsoft Corp.*, 784 F. Supp. 2d 356, 369 (S.D.N.Y. 2011)
21 (economic injury may occur at a place other than the plaintiff's residence "where a
22 plaintiff maintains a separate financial base and where the impact of the financial
23 loss is felt at that location.") (internal citations, quotation marks, and alterations
24 omitted); *Epstein v. Haas Sec. Corp.*, 731 F. Supp. 1166, 1178-79 (S.D.N.Y. 1990)
25 (finding that even though plaintiffs resided in Pennsylvania and New Jersey, New

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⁷³ See N.Y. C.P.L.R. § 202 ("An action based upon a cause of action accruing
27 without the state cannot be commenced after the expiration of the time limited by
the laws of either the state or the place without the state where the cause of action
accrued, except that where the cause of action accrued in favor of a resident of the
28 state the time limited by the laws of the state shall apply.").

1 York was the “situs of the injury for purposes of the borrowing statute” .

2 Here, the relevant factors all show that any injury would be incurred (if
3 anywhere) in Germany. Sealink is an SPV that holds MBS purchased by two other
4 SPVs that had been created to invest the assets of Sachsen LB (a German bank).
5 Sealink continues to serve as a mere conduit for several German Landesbanks that
6 hold the financial interest in its assets. More specifically, when German Bank
7 LBBW acquired Sachsen LB, it and a group of senior German Landesbanks
8 assumed any and all losses arising from the assets in Sealink’s portfolio. In
9 addition, LBBW and the Free State of Saxony have guaranteed the performance of
10 those assets, and will incur any losses associated with them. Accordingly, any
11 injury in this case would be felt in Germany, and New York’s borrowing statute
12 would therefore apply German limitations rules to Sealink’s four common-law tort
13 claims.

14 **2. Germany’s Three-Year Limitations Period Bars
15 Sealink’s Claims.**

16 Germany’s statute of limitations for tort claims is three years. *See*
17 Declaration of Thomas M. Buhl (“Buhl Decl.”)⁷⁴ ¶ 4 (citing BGB § 195). This
18 limitations period begins to run at the end of the year in which the claim accrues.
19 *Id.* ¶ 4 (citing BGB § 199). Under German law, a claim accrues when plaintiff
20 either (i) gained knowledge of the circumstances and party giving rise to the claim,
21 or (ii) would have acquired such knowledge but for its own gross negligence. *Id.*
22 Here, such knowledge would have been acquired by any reasonable investor no later
23 than late 2007.

24 More specifically, the gravamen of Sealink’s primary-liability claims is that

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26 ⁷⁴ Under Federal Rule of Civil Procedure 44.1, the Countrywide Defendants hereby
27 give notice of their intent to raise an issue about German law. *See* Fed. R. Civ. P.
28 44.1; *see also Alperin v. Vatican Bank*, 2006 WL 1663847, at *1 (N.D. Cal. June 15,
2006) (considering declaration concerning foreign law issue pursuant to Fed. R. Civ.
P. 44.1).

1 Countrywide “abandon[ed] its own guidelines for loan origination and
2 underwriting.” *See, e.g.*, Compl. ¶ 82. In *Stichting*, where “the gravamen of
3 Plaintiff’s claim” likewise was “that Countrywide wholly abandoned its
4 underwriting standards,” this Court found that “[t]he press and numerous widely
5 reported lawsuits had made exactly this allegation by the end of 2007.” 2011 WL
6 3558173, at *9. In that regard, the Court considered three October and November
7 2007 complaints against the Countrywide Defendants: (i) an October 30, 2007
8 putative class-action complaint, *Argent Classic Convertible Arbitrage Fund L.P. v.*
9 *Countrywide Fin. Corp., et al.* (C.D. Cal., No. 07-CV-07097) (“*Argent*”), alleging
10 violations of the 1934 Act and various other claims; (ii) a November 14, 2007
11 putative class-action complaint in *Luther*, alleging violations of the 1933 Act; and
12 (iii) a November 26, 2007 shareholder derivative complaint, *Ark. Teacher Ret. Sys.,*
13 *et al. v. Mozilo* (C.D. Cal., No. 07-CV-06923) (“*Arkansas Teacher*”), alleging
14 violations of the 1934 Act and various other claims.⁷⁵

15 Each of these complaints alleged that Countrywide misrepresented the quality
16 of its MBS and/or the loans backing its MBS, and their allegations are virtually
17 identical to Sealink’s allegations. The following chart lists just a few examples of

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19 ⁷⁵ The *Luther*, *Argent*, and *Ark. Teachers* complaints are attached as Exhibits 71, 78,
20 and 89-91 to the RJN. These complaints followed even earlier lawsuits that had
21 made substantially similar allegations, including a consumer class action alleging
22 that the Countrywide Defendants were making unsuitable loans to borrowers. *See*
23 *Fitzhugh v. Countrywide Fin. Corp.*, No. 04-6830 B (D.C. Super. Ct. Sept. 13,
24 2004) (alleging that Countrywide perpetrated “a fraud and predatory lending
25 conspiracy . . . designed to deceive the Federal Housing Administration (‘FHA’),
26 Fannie Mae, investors and Plaintiffs”) (RJN Ex. 92). Likewise, as the secondary
27 mortgage market and credit markets seized up and Countrywide’s stock price
28 dropped sharply beginning in the third quarter of 2007, additional plaintiffs in a
series of putative securities class action complaints asserted similar fraud claims
about Countrywide’s origination of “risky” loans, the “erosion of underwriting
guidelines” at Countrywide, the “rapidly deteriorating performance of its loan
portfolio and securities,” its supposedly “shocking” and “unexpected” disclosures,
and its allegedly “knowing” or “reckless” misstatements regarding its lending
practices. *See Saratoga Advantage Trust v. Countrywide Fin. Corp.*, No. 07-CV-
06635 (C.D. Cal. Oct. 11, 2007) (RJN Ex. 77); *Norfolk County Retirement Sys. v.*
Countrywide Fin. Corp., No. 07-CV-05727 (C.D. Cal. Aug. 31, 2007) (RJN Ex. 76);
Pappas v. Countrywide Fin. Corp., No. 07-CV-05295 (C.D. Cal. Aug. 14, 2007)
(RJN 75).

1 this overlap:

2 3 <i>Sealink Allegations</i>	<i>Allegations in the Argent, Luther, and Arkansas Teacher Complaints</i>
4 5 6 7 8 9 10 11 12 13 “Countrywide ‘developed a systematic pattern and practice of abandoning its own guidelines for loan origination and underwriting . . .’” (<i>Sealink</i> Compl. ¶ 82.)	“While the Company consistently touted its underwriting, Defendants completely abandoned any pretense of doing their job in this regard.” (<i>Ark. Teacher</i> Compl. ¶ 100.)
	“As a result [of omissions and or misrepresentations in the Registration Statements], the Certificates sold to plaintiff and the Class were much riskier than represented in the Registration Statement.” (<i>Luther</i> Compl. ¶ 8.)
	Defendants “did not follow Countrywide’s reportedly strict underwriting and loan-origination practices. . .” (<i>Argent</i> Compl. ¶ 4.)
14 15 16 17 18 19 20 21 “Countrywide developed a systematic pattern and practice of . . . knowingly lending to borrowers who could not afford to repay the loans. . . or who otherwise did not satisfy the basic risk criteria for prudent and responsible lending that Countrywide claimed to use.” (<i>Sealink</i> Compl. ¶ 82.)	“Countrywide has also regularly made significant amounts of subprime loans to individuals with minimal or no documentation of income, employment or significant assets.” “Defendants . . . made a material portion of Countrywide loans with little, if any, supporting documentation, such that Countrywide had no way of confirming the credit worthiness of many loan applicants.” (<i>Argent</i> Compl. ¶¶ 2, 4.)
	“The Registration Statements omitted and/or misrepresented that the sellers . . . were issuing many of the mortgages to borrowers who . . . did not have the income required buy the lenders’ own guidelines to afford the required mortgage payments.” (<i>Luther</i> Compl. ¶ 7.)

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Sealink Allegations	Allegations in the Argent, Luther, and Arkansas Teacher Complaints
“Countrywide . . . allowed pervasive exceptions to its stated underwriting standards in the absence of compensating factors” (<i>Sealink</i> Compl. ¶ 64.)	“Countrywide Home Loans was granting exceptions to ‘standard underwriting practices,’ regardless of whether ‘compensating factors’ existed.” (<i>Luther</i> Compl. ¶ 53.)
	“Countrywide pushed one goal above all others – originating loans and selling them to the secondary markets as fast as possible, regardless of the quality of the loans, the suitability of the products for the borrower at issue, or the number and magnitude of ‘exceptions’ to Countrywide’s supposed underwriting standards that were necessary to place the loans with the borrowers.” (<i>Ark. Teachers</i> Compl. ¶ 117.)
Additional examples of the substantially identical allegations in the <i>Sealink</i> complaint and complaints filed in 2007 are listed in the Appendix at 15.	
<p>At the same time that these allegations were being made in these complaints, the media reported that Countrywide “intended to wring maximum profits out of the mortgage lending boom no matter what it cost borrowers.” Gretchen Morgenson, <i>Inside the Countrywide Lending Spree</i>, N.Y. Times, August 26, 2007, § 3 (Money and Business/Financial Desk) at 1 (RJN Ex. 112); <i>accord</i> E. Scott Reckard, <i>Prime Loans Seeing Rise in Defaults</i>, L.A. Times, December 28, 2007, § C (Business) at 1 (RJN Ex. 113). As a result, the media alleged, Countrywide’s “[d]elinquency and foreclosure rates have soared.” Michael A. Hiltzik, <i>Countrywide’s Confident Tone Turned to Crisis</i>, L.A. Times, September 3, 2007, § C (Business) at 1 (RJN Ex. 111).</p> <p>Any investor reasonably should have gained knowledge of the information underlying these allegations and media reports absent their own gross negligence. As this Court held in <i>Stichting</i>, “a reasonably diligent investor should have been</p>	

1 aware of at least some . . . of [t]he[se] allegations, [which] involve the same
2 underlying conduct (abandonment of underwriting standards) and the same
3 fraudulent purpose (concealing true loan quality from the market so that
4 Countrywide could continue to increase market share, sell RMBS, and inflate its
5 stock price) as alleged here.” *Stichting*, 2011 WL 3558173, at *8, 10. For these
6 reasons, the Court in *Stichting* concluded “that public press reports and earlier-filed
7 lawsuits placed Plaintiff on notice regarding the scienter element of its claim.” *Id.* at
8 *11; *accord Allstate*, 2011 WL 5067128, at *11 (“[A] sufficient inference of
9 scienter exists to support the allegation that Countrywide knew that it had
10 abandoned its underwriting standards.”).

11 So too here. These press reports and the claims asserted by numerous other
12 investors by late 2007—which were factually and legally identical to Sealink’s
13 primary-liability claims here—are “near dispositive” proof that by late 2007 Sealink
14 as well should have gained knowledge of the circumstances that it contends support
15 its fraud and negligent-misrepresentation claims. *See In re Am. Funds Sec. Litig.*,
16 556 F. Supp. 2d 1100, 1109 (C.D. Cal. 2008). Under German law, the limitations
17 period on those claims thus began to run on December 31, 2007 (*i.e.*, the end of the
18 year in which the claims accrued), and then expired on December 31, 2010, three
19 years later and almost ten months before this suit was filed. *See* Buhl Decl. ¶ 4.
20 Thus, Sealink’s September 29, 2011 complaint is untimely, and its claims against
21 the Countrywide Defendants (in the first four counts of its complaint) should be
22 dismissed with prejudice.

23 **3. Sealink’s Negligent Misrepresentation Claim
Is Also Barred Under New York Law.**

25 Sealink’s negligent misrepresentation claim (Count IV) is also time-barred
26 under New York law. Under the New York borrowing statute, a claim must be
27 timely under both the limitations period applicable in New York as well as the
28 limitations period of the jurisdiction in which the claim accrued. *See* N.Y. C.P.L.R.

1 § 202. In New York, a negligent misrepresentation claim not involving fraud is
2 subject to a three-year statute of limitations, which runs from the date the alleged
3 misstatement was made. *See N.Y. C.P.L.R. § 214(4); Colon v. Banco Popular N.*
4 *Am.*, 59 A.D.3d 300 (N.Y.A.D. 1st Dep’t 2009); *HSBC Bank USA v. Bond*,
5 *Schoeneck & King, PLLC*, 16 Misc. 3d 813, 834 (N.Y. Sup. Ct. 2007), rev’d on
6 other grounds, 55 A.D.3d 1426 (N.Y.A.D. 4th Dep’t 2008); *IT Corp. v. Ecology &*
7 *Envt'l Eng’g*, 275 A.D.2d 958 (N.Y.A.D. 4th Dep’t 2000); *Ambassador v. Euclid*,
8 1984 WL 341, at *4 n.7 (S.D.N.Y. May 24, 1984). Because Sealink’s negligent
9 misrepresentation claim “expressly disclaims any claim of fraud or intentional
10 misconduct,” *Sealink* Compl. ¶ 153, that three-year limitations period applies here.
11 *Cf. Stichting*, 2011 WL 3558173, at *13 n.11 (applying two-year limitations period
12 to negligent misrepresentation claim under California law, because plaintiff
13 “expressly disclaimed all of its scienter allegations with respect to its negligence-
14 based claims”).⁷⁶ And because all of the alleged misstatements occurred before
15 September 29, 2008 (*i.e.*, more than three years before the Complaint was filed),
16 Sealink’s negligent misrepresentation claim is time-barred under New York law.

17 **CONCLUSION**

18 For all the reasons set forth above, the Countrywide Defendants respectfully
19 request that the Court dismiss all time-barred claims in *Putnam, AFAC, Western &*
20 *Southern, National Integrity, Bankers, Sterling*, and *Sealink* with prejudice.

21 Dated: December 7, 2011

22 **GOODWIN PROCTER LLP**

23 /s/ Brian E. Pastuszynski

24 Brian E. Pastuszynski (*pro hac vice*)
Lloyd Winawer (State Bar No. 157823)
Inez H. Friedman-Boyce (*pro hac vice*)
Brian C. Devine (State Bar No. 222240)

25 *Counsel for the Countrywide Defendants*

26 ⁷⁶ *See Sealink* Compl. ¶ 153 (“Plaintiffs repeat and reallege each and every
27 allegation set forth in the preceding paragraphs above as if fully set forth herein,
28 except any allegations that the Countrywide Defendants made any untrue statements
and omissions intentionally or recklessly.”).